OWOLABI 'S PROPERTY LAW PRACTICE NOTES FOR 2016/2017 ACADEMIC SESSION

WEEK 3

GENERAL OVERVIEW AND APPLICABLE LAWS

THE COURSE COVERS MAJORLY THE FOLLOWING TOPICS:

A. Applicable laws

B. Deeds

C. Power of attorney

D. Sale of land

E. Leases and tenancies

F. Mortgages

G. Land Registration Law of Lagos State, 2015

H. Billing and Recovery of Professional fees

I. Wills and Codicils

J. Probate Practice

K. Personal Representatives

L. Property taxation

PROPERTY

Property law practice in Nigeria involves the processes of acquisition of land and devolution of property. Property as it relates to property law practice, includes movable and immovable i.e. realty and personality. But the real property takes the bulk of this course. This means the course deals majorly with land or anything attached to the land or any interest in land simpliciter.

JURISDICTIONS IN PROPERTY LAW PRACTICE

1. **PROPERTY AND CONVEYANCING LAW JURISDICTION covering the** Former Western and Mid-Western Regions which comprise Ogun, Osun, Oyo, Ondo, Edo, Ekiti, and Delta states.
2. **CONVEYANCING ACT JURISDICTION** (CA) covering the rest of Nigeria (The entire North, South-South and South-East of Nigeria): it is also applicable in some parts of Lagos state where there is a lacuna in the applicable law, but generally Lagos is excluded.
3. **AREAS COVERED BY THE LAND REGISTRATION LAW OF LAGOS STATE (LRL), 2015 AND MORTGAGE AND PROPERTY LAW OF LAGOS OF STATE 2014.** The latter law repeals the Conveyancing Act as it relates to mortgage transactions in Lagos. Ordinarily and Generally, **Conveyancing Act is applicable to Lagos in some matters but does not any longer regulate issues of mortgage**. **PLEASE NOTE:**

a. **Registration of title law in Lagos has been repealed by Land Registration Law of Lagos 2015.**

b. **With regards to specific transactions and any area under examination there are different laws that could be applicable e.g. the Lagos State Tenancy Law regulates tenancy in Lagos state but of course it does not in itself apply to the whole of Lagos.**

c. **Where there is a lacuna in any of the laws in any state, depending on the state, the Conveyancing Act is resorted to even in Lagos state please note!**

TRANSACTIONS IN PROPERTY LAW PRACTICE:

1. **ASSIGNMENT/SALE OF LAND**: this involves the transfer or conveyance of interest in land, i.e. the transfer of unexpired residue. It involves transfer of title plus reversionary interest. Technically, a sale of land is a contract of sale but in accord with the language of the Land Use Act it is called an **Assignment**.
2. **LEASE**: this involves giving or grant of a term of years, conveyance or transfer of title minus reversionary interest. The duration or term of years granted is lesser than that of the lessor or landlord. The term of years reverts back to the lessor/landlord.
3. **TENANCY;** Difference between **lease** and **tenancy**? Lease is a term of years above three years and tenancy is a term of years of three years and below. **Grant** of term of years in land: (**Tenancy** and **Lease**). Please note that under tenancy Law of Lagos State, 2011 the word tenancy is used in reference to a lease).
4. **MORTGAGE OF INTEREST IN LAND/CHARGES**: (this involves the transfer of interest in a property in consideration of a loan with the proviso for reversion of the title. There must be a proviso for re-conveyance upon payment of the loan/proviso for cesser upon redemption.
5. **DONATION OF POWER TO ACT IN RESPECT OF PROPERTY OR POWER OF ATTORNEY**: this is a power or an authority given to a person to do any lawful act on behalf of the donor or principal. The power may be for a fixed term or for a consideration. When used in Land matters must be executed by deed. **Deed Is Required In a Power Of Attorney Only If the Transaction for Which the Attorney Is Being Appointed Requires the Execution of a Deed.** See Abina v Far hat.
6. **GIFT OF LAND:** voluntary transfer or conveyance of any interest in land made gratuitously to a recipient plus reversionary interest minus consideration. It lacks the element of bargain based on the principle of *quid pro quo***.**
7. **WILL** (a testamentary statement by the testator with regard to the distribution of his estate upon his death). **Codicil** (a supplemental document executed to correct, amend or revive a will). Codicils cannot be without a will but not vice versa.
8. **EASEMENT**, **LICENSE ETC…**

DOCUMENTS IN PROPERTY LAW

a. **DEED** (A document in writing, signed seal and delivered) documents in writing does not necessarily need be sealed but when it is properly sealed it is a deed. Transfer of interest in land must be by way of deed. **Deed poll is a** (executed by only one party E.g. power of attorney, deed of gift)**. N.B a Power Of Attorney is not the same as a deed). Indenture** (document or deed between two or more parties) e.g. Deed of Assignment (DOA), (essence is transfer of interest in land with the reversionary interest. Parties are Assignor and Assignee. **Note that the assignor comes before assignee in appending the name and signature (attestation).** Deed of Lease (DOL) (parties are lessor and lessee); Deed of legal mortgage (mortgagor, mortgagee and in some instance a guarantor/third party).
b. **DEED SUPPLEMENTAL:** it is used in the correction of a deed indenture.
c. **WILL:** a testamentary document stating the dispositions of the deceased testator. It is executed when the deceased is testate.
d. **ASSENT** (documents executed by a personal representative in favour of a beneficiary it transfers the property to the beneficiaries)
e. **LETTERS OF ADMINISTRATION** (LOA) (it is issued in the absence of a will i.e. where the deceased died intestate or in cases of partial intestacy), while letters of administration with Will annexed is issued when there is a will but the testator has no executors, or the executors refused probate or they are absent or they revoke their powers.
f. **PROBATE** (granted in the presence of a will, the deceased died testate). Chances are that Probate and Letter of Administration may be issued at the same time (in the partial intestacy i.e. where the will does not include the whole of the estate and it falls short of residuary clause). Probate is issued to the executors of a will. In both transactions the personal representatives are granted the letter of administration and the probate respectively.
g. **CERTIFICATE OF OCCUPANCY:** the document indicating the right of occupancy granted by the Governor to the occupier of the land. it is a good root of title in state grant of land/property see the Land Use Act:
h. **BILL OF CHARGES: prepared by the solicitor to state and charge his fees.**

PARTIES IN PROPERTY LAW TRANSACTION: The designation of the parties depends on the transactions. E.g. in Deed of Assignment for example: (**vendor** and **purchaser** in the stage of the formal contract for the sale of land). (In the post contract stage the Deed of Assignment is executed by the **assignor** and **assignee** as the parties)**.** In a lease its lessor and lessee and/or landlord and tenant. In mortgages, mortgagor and mortgagee. In a power of attorney they are called the donor and the donee.

DIFFERENCE BETWEEN PERSONS AND PARTIES: Two or more individuals can make a party e.g. in cases of a couple and family land respectively. The name must be written disjunctively. There is no limit in law as to the number of persons that make up a party. However, in cases involving corporations, the name of the company is used as the party because the company is a separate legal entity on its own that has corporate personalty. If it is a conglomerate of two or more names need not be written disjunctively for proper maintenance of the principle of juristic personality. E.g. A & B Ltd (as assignor). Don't write A & B enterprises as assignor. Because in the latter case, A will be written separately from B because A & B enterprises cannot represent an entity known to law they are business names not legal personalities. **You can write, A & B trading under the name and style of A& B enterprises.**

APPLICABLE LAWS:

1. **RECEIVED ENGLISH LAW**
2. **NIGERIAN LEGISLATIONS GENERALLY:**
3. **CUSTOMARY LAW**
4. **ISLAMIC LAW**
5. **CONSTITUTION FEDERAL REPUBLIC OF NIGERIA 1999 AS AMENDED**
6. **LAND USE ACT, 1978**
7. **LEGAL PRACTITIONERS ACT, 2004**
8. **RULES OF PROFESSIONAL CONDUCT, FOR LEGAL PRACTITIONERS 2007**
9. **EVIDENCE ACT, 2011**
10. **PERSONAL INCOME TAX ACT**
11. **COMPANY INCOME TAX ACT**
12. **COMPANIES AND ALLIED MATTERS ACT, 2004**
13. **PROPERTY AND CONVEYANCING LAW 1959**
14. **CONVEYANCING ACT, 1881/1882**
15. **MORTGAGE AND PROPERTY LAW OF LAGOS STATE 2014**
16. **INCOME TAX MANAGEMENT ACT**
17. **STAMP DUTIES ACT, 2004**
18. **ADMINISTRATION OF ESTATE LAWS OF EACH STATE**
19. **CIVIL PROCEDURE RULES OF THE HIGH COURT OF EACH STATE.**
20. **CASE LAWS**
21. **INTERPRETATION LAWS/ACT**
22. **STATUTE OF FRAUD, 1677**
23. **LAND INSTRUMENTS REGISTRATION LAWS OF VARIOUS STATES**
24. **ILLITERATE PROTECTION ACT/LAWS**
25. **LAND INSTRUMENTS PREPARATION LAWS OF VARIOUS STATES**
26. **WILLS ACT, 1837**

27. **WILLS LAWS**
28. **ADMINISTRATION OF ESTATES LAW**
29. **HIGH COURT CIVIL PROCEDURE RULES OF VARIOUS STATES**
30. **CAPITAL GAIN TAX ACT**
31. **INCOME TAX MANAGEMENT ACT**
32. **PERSONAL INCOME TAX ACT**
33. **LAND REGISTRATION LAW OF LAGOS STATE 2015**
34. **LAGOS STATE TENANCY LAW, 2011**
35. **TOWN PLANNING LAWS**

ETHICAL ISSUES

Ethical issues (RPC) in each of the transactions involving transfer of title or any interest in property/Duties of solicitor in connection with property transactions include but not limited to the following:

1. Duty to observe the rule of law and act within the bounds of the law in all dealings and transactions-**rules 1 & 15**
2. Duty to advise the client appropriately according to the applicable law to a given situation or transaction AND RULE 15 RPC, **See NBA v Akintokun (2006) All FWLR part 133 p 1720**.
3. Duty to prepare a document having regard to the applicable laws to that document. See **OLUFINTUYI v BARCLAYS Bank (1965) NMLR 142**
4. Duty not to engage in legal practice with a non-legal practitioner in the course of dealing with the client's property-**rule 3**
5. Duty to be dedicated and devoted to client's cause **at every time –rule** 14.
6. Duty to be competent and not negligent with the dealings/transaction with the property of the client-**rule 16**
7. Duty to avoid conflict of interests in all transactions-**rule 17**
8. Duty to keep to terms of agreement with client and not being deceitful **-rule 18**
9. Duty to keep client's information or instruction confidential and safe from broadcast/unnecessary publicity-**rule 19.**
10. Duty not to receive instructions about any transaction at the Client's House/Office except as the law permits **-rule 22**
11. Duty to show utmost good faith/ and not misappropriate client's funds or property during or after the relationship-**rule 23.**
12. Duty not to improperly attract business of legal practice **as it relates to a particular client or transaction -rule 39**
13. Duty to show good faith with professional colleagues in dealing with a client's property **rule** 26
14. General and specific important duties to the court-**rules 30-36**
15. Duty to charge adequately but not excessively Rule 48:
16. Duty to keep proper account/records rule. Rule 23
17. Duty to be honest and render sincere and candid advice 14
18. Duty not to mix-up or covert the client's money rule 23

WEEK 4

DEEDS

DEFINITION OF A DEED

A deed is an instrument/document in writing which is evidence on information about what it contained made of paper or the like (e.g. vellum of parchment) and which is signed, sealed and delivered. It is made on a paper and it is signed, sealed and delivered , for an illiterate it is marked. Usually it is used to covey, revoke, ratify an interest in land or bestow a property or power. A deed may be used to effect the conveyance of an interest, right or property in a real estate, it can be used to create an obligation binding on a person and it can be used to confirm some acts whereby an interest or property has already passed. Examples of deeds include deed of lease OR sublease, deed of legal mortgage, deed of gift, deed of release of mortgage and deed of assignment. Please note that a deed of rectification/ supplemental is used to rectify an anomaly in a deed. --- to show that, there was a mistake in a deed of assignment executed by the parties on…. With respect to the DEED…

TYPES OF DEED:

- **DEED POLL**: executed or granted by one party (for example a Power Of Attorney under seal, DEED OF GIFT, DEED OF RATIFICATION etc.)
- **DEED INDENTURE:** it is traditionally referred to as an indenture. It is a deed or document executed by two or more parties. DEED OF ASSIGNMENT, DEED OF LEASE and deed of legal mortgage. etc

WHEN A DEED IS REQUIRED/MANDATORY (TRANSACTIONS THAT MUST BE UNDER SEAL)

1. **Lease beyond/above three years.**
2. **Contracts that lacks consideration or not supported by consideration is to be created. E.G. A GIFT**
3. **By requirement of statute in transferring or creation of a legal interest in land**
4. **A Power of Attorney to authorise the attorney to execute a deed.**
5. **Revocation, ratification, withdrawal of a deed can only be effected by a deed.**
6. **Discharge of a legal mortgage**
7. **Creation of legal mortgage**
8. **Agreement for transfer of shares under CAMA**
9. **Voluntary Surrender of leases**
10. **Vesting declaration**

WHEN A DEED IS NOT NEEDED

1. **Assent**: created by a personal representative of a deceased person in favour of a beneficiary (mostly used in probate action) to transfer the title to property
2. Generally a power of attorney
3. vesting order of court (may be an order of)
4. receipt not required to be under seal
5. conveyance taking effect by the operation of law
6. transaction covered by the rule of **Walsh v Lonsdale**
7. short term lease (tenancy); 3 years and a below
8. will

ESSENTIALS OF A VALID DEED

- **WRITING: since a deed is an instrument.** Any paper can be used to prepare a deed.

- **IT MUST CREATE AN OBLIGATION:** when the transfer is for an intention to be bound. A deed can be used to revoke any transaction whether by deed or not. It can be used to revoke
- **SIGNING**: it must be signed or marked as the case may be. No requirement for signature under common law. However under the sections **83 (4)** and 93(1) Evidence Act, a document must be signed to be admissible. See the case of **AG ABIA v AGHARANYA (1999)** and the case of **Omega Bank v OPC** … **Uses of signing**: it cannot be enforced against the person who did not sign (the rule of privity), the person who is not part of the transaction cannot enforce any benefit arising from the transaction. See the case of **TWEDDLE v ATKINSON and NIGER GATE LTD V NIGER STATE GOVT. (2005) and LEWIS V UBA (2006)1 NWLR (pt 962)** on who is an illiterate? It is the test of understanding the language of the transaction in question.
- **SEAL**: the general rule is that sealing is a sine qua non to a transaction involving deed. It must be sealed. Putting the physical seal was an old law, this used to be condition of the past. Now what the court looks for is the intention for the document to be sealed not necessarily be physical sealed. Any indication or expression in the document indicating or intended sealing. E.g. commencement clause, testatum, Testimonium and signed sealed and delivered. At common law it is compulsory. **FIRST NATIONAL SECURITY V JONES (1978) 4 WLR 475 and s. 156 of the E.A. In Awojugbagbe v Chinukwe** the Supreme Court held that by putting the circle and the letters LS in Latin meaning Locus siglis i.e. place of a seal. **On when a seal cannot be dispensed with:** In cases of company, a seal must be appended in the presence of director and secretary or two directors.
- **DELIVERY**: it does not necessarily mean handing over of the document. A deed cannot be executed without delivery. It is delivered when an interest or right passes. It does not mean parting with physical possession of the document. What is apt is the intention to pass the interest.
- **Types of delivery: Absolute delivery or unconditional delivery**: in this case the document takes effect immediately. The parties have done the necessary completion procedures.
- **Conditional delivery (subject to contract) or delivery in escrow**: ab initio takes effect on the day of delivery. It is subject to the fulfilment of certain conditions. Even though it was delivered pending the fulfilment of the condition, but note the principle of the **doctrine of relation back**.

- **DATE: it is important.** It plays a vital role in the deed. Every deed should be preferably undated. It will rely on the date of delivery**. Effective date of document in writing. See section 157 of the Evidence Act and Section 23 (3) of Stamp duties Act, It takes effect from the date of execution while a deed takes effect from the date of delivery. An effective date of deed in escrow by doctrine of relation back, it takes effect from the date of delivery not the date of fulfilment of the condition containe**d therein. See **ALAN ESTATES LTD V W.G STORES LTD (1981) 3 WLR 892 @898, BESSELY V HALLYWOOD (1961) CH 102**

- **EXECUTION MUST BE WITH AN ATTESTATION**: Generally Attestation is not a strict requirement of the law but it facilitates proof of due execution. **(A witness must be an adult, preferably not a spouse.)** Witnesses sign the document after seeing it. **Signature + attestation = SEALING** see Sections 117, 118, 150 and 159 of the Evidence Act

IT IS MANDATORY:

- For presumption of due execution
- When there is Presence of a blind person see **AKINGBADE v OLAYINKA (1979)**
- When there is Presence of an illiterate see section 8(1) of the Land registration Act in Abuja and the case of **OGUNLEYE V SAFEJO (2010)**
- When a foreigner who does not understand the language becomes an illiterate therefore an attestation and due execution is necessary.
- When corporate body is involved: see Section 163 of the Evidence Act: In drafting a will for proper execution see section 9 of the wills act 1837 **See UZOECHI v ALINOR (2001).**
- **FRANKING**: Franking: endorsement on the deed of the name address and signature of the legal practitioner as the draftsman not as a witness. Please take note. **An unfranked deed may not be accepted for registration rule 10 RPC 2007. It is necessary for the fulfilment of the provision of the law. See also section 22 (1) d of the LPA and see section 4 of the Land instrument preparation law. It removes the deed from the provision of the illiterate protection law or act.**
- **ENDORSEMENT FOR GOVERNOR'S CONSENT**: it contains something of this nature where the Governor would state that: I consent to this transaction dated this. See the case of **ADEDEJI V NBN (1990**), section 10 Land Instrument registration law.

- **Effects of failure to obtain Governor's consent: the transaction is void and inchoate see AWOJUGBAGBE v CHINUKWE and no registration would be allowed without Governor's consent.**
- **PERFECTION OF TITLE:** it involves **Governor's consent**, **stamping** and **registration**. the Abuja Geographical Information System is where searches and registration are done while in Lagos it is done at the land registry of Lagos State

FORM AND CONTENTS OF A DEED

- **INTRODUCTORY PART: Commencement: (determined by the nature of the transaction), date, parties, addresses, descriptive words (nature of the transaction) and sometimes recital.**
- **OPERATIVE PARTS** (testatum, consideration clause, receipt clause, capacity clause, **words of grant,** OPERATIVE WORDS, **parcel clause, habendum)**
- **MISCELLANEOUS PART** (indemnity clause, covenants and undertaking for safe custody and acknowledgement clause, insurance policy clause etc.)
- **CONCLUDING PART** (testimonium, execution and Attestation clause, franking and endorsement for Governor's consent)

1. **COMMENCEMENT**: THIS DEED OF LEGAL MORTGAGE/ LEASE/ ASSIGNMENT/ GIFT **(is added only when there is need for recital)……**
2. **DATE**: relevant for stamp duties purposes. General rule: **leave your date blank** i.e. leave your deed undated. You cannot contradict the agreement in a deed on point of false date. See ONASHILE v IDOWU (1961)1 all NLR 313

- **PARTIES**: name, description, capacity and Addresses. Must be juristic persons (Natural person, artificial person under part A, company's name + **a company registered under part A of CAMA having its registered office at** …..) and if its C(used the name of the registered trustees)
- Representatives of a family (family head and principal members (**for themselves and on behalf of members of the Sho-Bond family**),
- Firms (**name of partners + carrying on business under the name and style of** (firm's name).).
- Know how to state the parties (**name and address (ASSIGNOR/LESSOR/ MORTGAGOR**) on the one part/ first part and……. (ASSIGNEE/LESSEE/ MORTGAGEE) of the other part/ second part) in a deed of legal mortgage where there are more two parties indicate the third part.

3. **RECITALS**: it is akin to a preamble in a legislation. It contains formal statement on some matters of fact and explain reasons upon which the subject matter of the transaction is found. It gives the historical antecedent of how the assignor obtained the authority to assign the said property. it can either be narrative or introductory, **Narrative Recital:** state history of the property and matters of how the vendor becomes the owner of the land **Introductory:** the agreement between the parties with respect to the property. **Introduction of recital: WHEREAS…. 1. …… 2…… 3……..**
   IMPORTANCE OF RECITAL: Matters/documents that are twenty years old at the date of the contract are taken as sufficient evidence and truth of the fact contained therein. **Section 155 Evidence Act see ODEMEYE v SAVAGE (1964) NMLR 115.** Recitals will also constitute estoppel on parties to the deed and person claiming through them. **DISTRICT BANK V WEB (1958) 1 ALL E.R.** It helps to clear ambiguity in the body of the document.- **Jenkins v Jenkins (1866) L. R Ex Ch.**
4. **TESTATUM** (operative part): **NOW THIS DEED WITNESSES AS FOLLOWS…**….
5. **CONSIDERATION**: ….IN CONSIDERATION OF THE SUM OF…. Paid by the ASSIGNEE to the ASSIGNOR): It shows the basis of the computation of taxes, It shows that a receipt will be issued for that sum, The essence of the consideration shows that the conveyance is not voluntary or free of charge.
6. **RECEIPT CLAUSE**: (THE RECEIPT OF WHICH THE ASSIGNOR ACKNOWLEDGES), It is prima facie evidence of payment of money, It makes it unnecessary to issue a formal receipt, Its sufficient authority for the purchaser to pay the Assignor's solicitor when he receives the deed.

❖ **COVENANT OF TITLE**: …, the ASSIGNOR AS A BENEFICIAL OWNER……implications: That the assignor have a right to convey, he has a good root of title, Grant of quite enjoyment, No encumbrance on the property, He is given further assurances. (Implied covenant). in Transactions involving lease, additional two: **That the head lease is valid and subsisting, All the transactions (outgoing rents and rates) involving the head lease have been cleared**

CONVEYANCE OF PROPERTY: 1. as beneficial owners (4 or 6 covenant depending on the interest), 2. As mortgagee, 3. As personal representatives

9. **WORD OF GRANT**: depends on the nature of transaction but align with the commencement. ASSIGNS-assignment, **CHARGES**- lease/ mortgage
10. **OPERATIVE WORDS**: ALL THAT…
11. **PARCEL CLAUSE**: description of the property. Where there is a plan…. MORE PARTICULARLY DESCRIBED BY THE PLAN ATTACHED TO THIS DOCUMENT.
12. **HABENDUM**: the interest conveyed. …. TO HOLD unto the ……. FOR THE TERM ……..

MISCELLANEOUS PART

13. **UNDERTAKING FOR SAFE CUSTODY** : Undertaking to keep the title document
14. **ACKNOWLEDGEMENT CLAUSE:** Acknowledgement to produce
15. **INDEMNITY CLAUSE :** Indemnify where the property does not pass

CONCLUDING PART

1. **TESTIMONIUM:** Forms of testimonium

In witness of which the parties have set their hands and seals the day and year first above Written. (Used where both parties as natural persons) OR In witness of which the parties have executed this DEED in the manner below the day and year first above written (recommended for all forms of parties)

2. **EXECUTION CLAUSE:** SIGNED SEALED AND DELIVERED… (for only natural person), THE COMMON SEAL OF….. (for juristic person) by the within named ASSIGNOR
3. **ATTESTATION**: IN THE PRESENCE OF … it includes name, address, occupation and signature.

FORMS OF EXECUTION: An individual, A limited liability company registered under part A CAMA, An organization registered under part C, A partnership (or a business name registered under part B of CAMA).

A. **AN ILLITERATE JURAT:** SIGNED, SEALED AND DELIVERED by the within named (ASSIGNOR/ASSIGNEE)
The matters above having been first read in English Language and interpreted to him in Yoruba/Igbo/Hausa language by me……(name and address of the interpreter) when he appeared perfectly to have understood same before affixing his thumb impression thereto.

B. Governor's consent:

C. Franking: PREPARED By: Name, Address of Chambers, Occupation and Signature of the Legal Practitioner.

WEEK FIVE 5

POWER OF ATTORNEY

POWER OF ATTORNEY is a formal legal instrument by which the **DONOR** appoints the **DONEE** to act on behalf of him generally or for specific purpose. See the case of **UDE V NWARA (1993) 2 NWLR PT 278, 647.** It must be in writing being a formal instrument. The omnibus clause is interpreted with specific duties where listed. **POWER OF ATTORNEY** is not same as agency relationship it's only similar to it. It's therefore a special type of agency.

DEFINITION OF TERMS

DONOR: the principal who donates the power

DONEE: the person to whom the power was donated

USE OF POWER OF ATTORNEY

Buying and selling of land on behalf of the donor;

Collect money on behalf of the donor;

Prosecuting cases in court (excludes Criminal Cases)

Receive rates, rents, profit;

Management of properties on behalf of the donor;

POWER OF ATTORNEY is not used to alienate or transfer title or interest in land: The owner or donor still retains all the power and interest in the property. He who hires can fire- UDE V NWARA**.** It is only an instrument of delegation of authority and a donee can only carry out legal acts that the donor can lawfully do.

FEATURES OF A POWER OF ATTORNEY

- It must be in writing because it's an instrument
- It's usually executed by one party, in form of a deed poll: **NB: Exception: Where there are rights and conditions inherent in the Power Of Attorney, the donee executes it with the donor. This is the case when it given for valuable consideration or hinged on contingencies or a particular interest/grant.**
- It is an instrument of delegation only not transfer of the interest in the property.
- It specifies the powers which the donee can do on behalf of the donor
- It is not an instrument of conveyance. S. 46 and 47 CA and s. 141 PCL.
- **The existence of Power of Attorney granted to the donee does not precludes the donor from personally carrying out the act(s). See. CHIME V CHIME, AJUWON V ADEOTI**
- A Power Of Attorney given in respect of a family property must be executed by the head of the family as one of the donors; otherwise it is void. See **AJAMOGUN** V **OSHUNRINDE** (1990) 4 NWLR (pt. 144) 407 at 419. A family head can donate the Power Of Attorney with the consents of the Permanent Members. Where the Family Head donates alone, the power will be voidable. I.e. it subsists but liable to being voided subject to the decision of the other members of the family. **Take note, where a member or any of the Principal Member donates without the consent of the Family Head, it becomes void.**

TYPES

- General:
- Specific
- Revocable
- Irrevocable

NB: no revocation after the execution of the act(s) contained in the Power Of Attorney. However, where the Power Of Attorney contains other acts not yet executed, the donor still retains the power of revocation.

INFORMATION NEEDED TO PREPARE A POWER OF ATTORNEY

- Particulars of the donor
- Particulars of the donee
- Particular of the witnesses
- Particular of the object of delegation
- Whether or not it is given for valuable consideration
- Whether or not it is irrevocable
- Duration of the irrevocability if any.

NB: Before revocation, note the mode of creation for it determines the mode of revocation. Document not in deed must be in writing because for the purpose of bar part two, power of attorney cannot be oral. Where the document i.e. Power Of Attorney is to do an act involving transfer of interest in land, it must be by deed. Therefore, appointment in writing is revocable by deed but not the other way round. Appointment by deed is revocable by deed only, see ABINA V FARHAT (1938) 14 NLR, 17 for all the above principles.

CAPACITY

- The donor must be capable of doing the act delegated. i.e. He must possess the legal right to the act. Both parties must be juristic entities in law (entity registered under part A of CAMA) or part C. see NATIONAL BANK OF NIGERIA LIMITED V KORBAN [1976] 1 FNLR 116.
- **Power Of Attorney can be conferred on more than one person but the instrument must state their exercise and extent of power, signature and the acts that will be bind the donor in relation to both parties.**

CONSTRUCTION OF POWER OF ATTORNEY

- Powers are construed strictly so the instrument should be drawn exhaustively
- A general or omnibus clause in a POWER OF ATTORNEY is not to be interpreted to confer any additional power on the donee. It must be construed in term of the specific power only. See ABINA V FARHAT

REVOCATION OF POWER OF ATTORNEY: Power Of Attorney may be revoked in any of these three ways;

- **EXPRESS REVOCATION:** simply means, he who hires can fire. This occurs during the subsistence of the Power Of Attorney. **See CHIME V CHIME, UDE v NWARA. T**he mode of hiring determines the mode of revocation. ADEGBOKUN V AKINSANYA, OJUGBELE V OLASOJI [1982] SC 71
- **IMPLIED REVOCATION:** it is the natural revocation of Power Of Attorney through the acts/conducts of the **DONOR**. It is effected by carrying out the act in person or given the power to another person or generally when the donor does an act inconsistent with the instrument of delegation. see the case of **CHIME V CHIME**
- **BY OPERATION OF LAW**: the death or other actions or phenomena of the donor or otherwise will automatically revoke the Power of attorney by operation of law. A Power Of Attorney is deemed revoked by operation of law if the donor suffers from: **A. death, B. insanity, C. Bankruptcy, D. other legal incapacity, during the subsistence of the power.**
- **INVALIDATION & REVOCATION:** Invalidation is traced to defect ab initio while revocation is done subsequent to the grant of the Power Of Attorney. An invalidated Power Of Attorney is liable to be revoked at the instance of the donor. **Fraud, duress, undue influence can invalidate a Power Of Attorney if properly established. SEE. AGBO V NWIKOLO [1973] 3 ESCLR**

The doctrine of irrevocability was created to protect both the donee and a third party as well as a result of the hardship created by revocation due to operation of law. Therefore for revocation by Operation of Law not to affect the parties, you include the irrevocability clause.

IRREVOCABILITY

- **BASED ON VALUABLE CONSIDERATION (MUST COME FROM THE DONEE TO TIE DOWN THE POWER OF ATTORNEY):** It must be stated in the document and the amount given must equally be stated. (The issue of valuable consideration lasts for as along the parties agreed). Therefore VALUABLE CONSIDERATION + EXPRESSION OF IRREVOCABILITY+ FIXED PERIOD OF TIME, S. 8[1] CA, 143[1] PCL, see the case of **UBA V REGISTRAR OF LAND. It must be stated for a particular period which may exceed 12 months since it is for a valuable consideration.**

- **The irrevocability operates for a stated period of time not exceeding twelve month or one year where there is no consideration: it subsists for a year.** Where the period exceeds one year, the power is valid but it is liable to be revoked. (any period of years can be stated in the Power Of Attorney, but it still subsists for 12 months since there is no valuable consideration but there is an irrevocability clause) **i.e. PERIOD OF TIME + IRREVOCABILITY=**
- **POWER GIVEN FOR A GRANT OR AN INTEREST**: **the Power Of Attorney stands irrevocable until the interest or grant is actualized/ realised or exhausted. Naturally a grant or interest is stated under valuable consideration.** Please note that **an irrevocable Power Of Attorney can be revoked by the consent of the donee after having been had and obtained.**

INNOCENT THIRD PARTIES: **Bonafide purchaser for value without notice of the defect in title of the donee is protected. The donee can protect a sale done when there is revocability of Power Of Attorney by operation of law through a Statutory Declaration within three month of the revocation by the operation of law. see section 142 PCL**

ESSENTIALS OF THE POWER OF ATTORNEY

- **ATTESTATION**: not mandatory in POWER OF ATTORNEY but if the instrument is to be used outside the country of its creation, it must be attested to by a **NOTARY PUBLIC.** See section 150 EVIDENCE ACTe AYIWO V AKOREDE [1951] 20 NLR, 4**. REASONS:** ** For presumption of due execution, ** Notaries public are recognized all over the world. NB: Unnotarised POWER OF ATTORNEY is valid for all intent and purposes but may only not be accepted in the country of tendering.
- **STAMPING AND REGISTRATION: POWER OF ATTORNEY attracts fixed stamp duty not ad valorem but a fixed duty.** Whether or not POWER OF ATTORNEY is registrable depends on its definition as an instrument under the Land Instrument Registration Law applicable in the state where it is to be used. **UZOECHI** V **ALLINOR**. But note that Non registration of a registrable POWER OF ATTORNEY renders it inadmissible in evidence. See OJUGBELE V ADESOJI and Uzoechi v Alinor

FORMAL PARTS OF A POWER OF ATTORNEY

a. **COMMENCEMENT:** THIS POWER OF ATTORNEY or BY THIS POWER OF ATTORNEY
b. **DATE**: MADE THIS----------DAY OF----------20…. or IS MADE THIS----------DAY OF --------20….
c. **PARTIES:** I ----------of
d. **RECITAL IF ANY: WHEREAS…RECITAL in POWER OF ATTORNEY is for interpretation purpose. It is rarely used in a POWER OF ATTORNEY but necessary in family land to show consent of other members of the family.**
e. **APPOINTMENT**: I----------OF---------- **APPOINTS**----------OF----------TO BE MY TRUE AND LAWFUL ATTORNEY AND IN MY NAME AND ON MY BEHALF TO DO ALL OR ANY OF THE FOLLOWING ACTS:
f. **AUTHORITY CLAUSE:** This is a statement/list of acts to be performed by the donee on behalf of the donor, It should be very clear and exhaustive (don't leave it blank)

1. ----------
2. ----------

Usually ends with an omnibus clause: To do all the things necessary and incidental to the matters above as I may lawfully do" PLEASE NOTE THAT: Omnibus clause does not give additional power SEE—ABINA V FARHAT

g. IRREVOCABILITY CLAUSE: In consideration of the sum of ----------only paid to the donor by the donee (the receipt of which the donor hereby acknowledges) I DECLARE THAT t**his power of attorney shall be irrevocable for a period of** --------MONTHS/YEAR------- from this day **or from the day of execution.**

h. TESTIMONIUM: IN WITNESS OF WHICH THE DONOR HAS EXECUTED THIS POWER OF ATTORNEY IN THE MANNER BELOW THE DATE AND YEAR FIRST ABOVE WRITTEN**.**

EXECUTION OF A DEED THROUGH AN ATTORNEY: SIGNED SEALED DELIVERED by---[assignor]----[name of the assignor]--through his lawful attorney of (name of donee), by virtue of a Power of Attorney dated-------- and registered as No-----page------- vol------ in the Land Registry office (state)…

i. **ATTESTATION CLAUSE:** IN THE PRESENCE OF: NAME, ADDRESS, OCCUPATION (NOTARY PUBLIC), SIGNATURE: see the case of **LABABEDI V ODULANA**

WEEK SIX PRE-CLASS:

CLASS PROPER: SALE OF LAND PART 1

This is a first step in the process of transferring interest/ title in land for valuable consideration. This type of transfer is a permanent transfer. **CONVEYANCERS ARE PARTIES INVOLVED IN THE SALE OF LAND**

THE PROBLEMS THEY FACE INCLUDE:

a. Poor and outdated record keeping system.
b. The problem of do-it-yourself syndrome
c. Lack of uniformity of laws
d. Land tenure system

APPLICABLE LAWS

- Constitution of the Federal Republic of Nigeria 1999 as amended
- Land Use Act 1978
- Conveyancing Act 1881 (ALL NORTH AND EASTERN STATE SAVE EDO AND DELTA)
- Property and Conveyancing Law 1959 (All the states of the west save Lagos)
- Land tenure Law 1962
- Stamp duties Act
- Land Instrument Registration law (Act of 1924)
- Land Instrument Preparation law
- Land Registration Law of Lagos 2015
- Customary land law of each locality
- Statute of fraud of 1677 s. 4
- S. 5, Law Reform contract Act, deals with the requirement of writing
- Common law and doctrine of equity

WAYS OF ACQUISITION OF LAND

- Purchase
- Conquest
- Gift inter-vivos
- Inheritance (testate and intestate)
- Allotment or partition of family property
- Grant from state authority/ customary grant
- First settlement on a virgin area
- Long adverse possession (usually 12 years depending on the jurisdiction)

PROOF OF TITLE

- By traditional evidence
- Production of documents duly authenticated and executed
- Acts of ownership extending over a sufficient length of time numerous and positive enough to warrant the inference of being the owner
- Acts of long possession and enjoyment
- Proof of long possession of adjacent land see the cases of **ELEGUSHI V OSENI (2005) 12 MJSC 33 and IDUNDUN v OKUMAGBA, MOGAJI V CADBURY**

PROBLEMS FACING CONVEYANCING NIGERIA

- Multiplicity of laws/ Duality of Tenure
- Illiteracy
- Customary land tenure e.g. family property

- Purchaser only see a solicitor at the tail/end of transaction
- No full appreciation of the value contract before conveyancing
- Uncritical dubbing of precedents
- Archaic mode of record keeping at the land Registries
- Professional incompetence and lack of diligence on the part of many conveyancers
- Materialism among legal practitioners.

LEGAL RESTRICTIONS TO SALE OF LAND IN NIGERIA

- Lack of uniformity of laws
- Illiteracy
- Lack of uniform procedure for perfection
- Professional incompetence
- Lack of standard procedure
- Incidents of customary land tenure law
- Problem of Land Use Act
- Contractual restrictions
- Town planning regulations/ laws

STAGES OF SALE OF LAND/CONTRACT OF SALE

It has five stages but two major segments or division viz;

- **CONTRACT STAGE**: equitable interest passed to the purchaser
- **COMPLETION STAGE**: the legal interest goes to the Assignee.

FIVE STEPS/STAGES INVOLVED IN SALE OF LAND

1. **1. PRE CONTRACT STAGE:** it is the first major step in conveyancing in Nigeria (leases, mortgages etc). it involves two major things; pre-contract enquiries and negotiation.

2. **a. PRE-CONTRACT INQUIRIES:** (to find if the property is suitable/fit for the purpose, location, structure, securities in the area, encumbrances on the property e.g., lease on the property) examine the patent qualities/defects of the property. **It is necessary as a result of the negative effect of application of the doctrine of caveat emptor i.e. buyer beware**. You may see the case of **YANDLE V SUTTON. In this stage you must Check for patent defects like the condition and nature of the property, such as leaking roof, broken walls, etc. things that are physical and apparent), checking for obvious encumbrances (power-line, pipeline, easement) these are useful tools that assist in negotiation.**

TYPES OF DEFECTS IN PROPERTY: patent defects and latent defects

- **PATENT DEFECT** (physical defects that can be seen with little effort on the part of the buyer): the vendor is not bound to disclose it.
- **LATENT DEFECT:** the vendor must disclose it. E.g. any mortgage, or lease on the property etc.

b. NEGOTIATION: this is a stage where the price is settled (negotiation is expected to be done by the purchaser, it is not strictly a legal or professional service of a lawyer) because usually the lawyer is contacted after negotiation

CONTRACT STAGE:

FEATURES OF CONTRACT STAGE:

1. Equitable interest passes to the purchaser
2. The transaction becomes binding
3. The death of either parties will not affect the contract
4. Risk passes to the purchaser

5. The vendor becomes a qualified trustee

TYPES OF CONTRACT OF SALE

1. **ORAL CONTRACT: also known as Parole Contract. It is valid according to the laws of contract.** Section 5 of Land Reform Contract Act, every transaction of interest in land must be in writing. See also section 4 of statute of fraud 1677. Generally, oral contracts are not enforceable but may generally be valid. See 5 Land RCA and Section 4 Statute of Fraud. **Therefore by virtue of these laws oral contract of sale of land fails to conform to the legal formality**
    - ❖ A sale of land must contain the following elements: **particulars of the parties, the price or consideration involved, the particulars of the property in question and the signature of the party to be bound.**

EXCEPTIONS WHERE THE ABOVE CONDITIONS OF THE VALIDITY OF PAROLE CONTRACT

- ❖ Where there is sufficient evidence of part performance by one of the parties: **see doctrine of equitable estoppel. The rule in Hyde's case**
- ❖ Sale of land through or in line with customary law or native law: For the sale to become valid, the following conditions must be satisfied:
- ❖ The transaction must be backed by consideration
- ❖ It must be concluded in the presence of at least two witnesses. See ODUSOGA V RICKET

FEATURES OF CONTRACT TO BE IN WRITING;

- ❖ The parties must be clearly identified (name, address and the position with regards to the transaction)
- ❖ Identify the consideration in the transaction.
- ❖ Particulars of the property must be given (the description, location and registration details of the property)
- ❖ The document must be signed with the signature of the parties to be bound.

2. **OPEN CONTRACT**: Form of contract that satisfies the minimum requirement of the law but does not do anything further. Thus it has the particulars of parties, particulars of the price, particulars of the property and the signature of the party to be bound. **It satisfied the minimum requirement of the law but leaves every other thing open to the presumption of the law**. Examples of open contract includes the following: **Receipt, Emails, Text messages, WhatsApp messages, exchange of letters, rough agreements etc. in so far as it contains the three Ps and one S above** as stated above.

DISADVANTAGES OF OPEN CONTRACT

a. No initial inquiry.
b. No proper legal documentation
- ❖ Left the transaction to the presumptions of law
- ❖ No particular statement as to the date of completion.

FORMAL CONTRACT: it satisfies the minimum requirement of the law and it is reduced into writing all the other terms, agreement or understanding reached by the parties during the negotiation which may alter the ordinary presumption of the law are provided for.

NEED/ ADVANTAGES/MERITS/ DIFFERENCES BETWEEN FORMAL AND OTHER FORMS OR IMPORTANCE OF A FORMAL CONTRACT

- o it Introduces some assurances to the conveyancing
- o It crystallizes the positions of the parties at an early stage in the transaction (their position with regards to the transaction will be known as against legal restriction)
- o it Can be used to circumvent implied covenants
- o Used to satisfy the requirement of writing
- o Parties can conveniently separate fixtures and fittings from land and building thereby reduces the incident of stamp duty
- o Help to determine the position of parties before completion is obtained
- o The purchaser is able to get enough information to enable him carry out a thorough search i.e. make requisition. Etc.
- o It prevents gazumping (arbitrary increase in price by a party)
- o It prevents last minute withdrawal except the other party defaults or consents

- Parties can confer special advantages/ privileges in the contract
- Death of either party will not affect the transaction
- Parties position are made more certain

EXCHANGE OF CONTRACT: It occurs only where there is a formal contract. It is the procedure that makes a contract binding. It is the exchange of the agreement between the parties**. No need for exchange when the two parties are acting by the same solicitor. Whether there will be exchange depends on whether or not the parties are represented by one or different solicitor.** When represented by different solicitors, it becomes necessary.

PROCEDURE FOR EXCHANGE

- Vendor's solicitor prepares the formal contract of sale
- Transmits the same to purchaser's solicitor for vetting (to satisfy that the agreement are kept as concluded by the party and no extrinsic clause is introduced as well as typographical errors) and confirmation of figures and particulars.
- Purchaser's solicitor collects from his client bank draft/ cheque for the deposit
- **The agreement/ contract is duplicated/ engrossed (engrossment is making the number of the copies needed) for the parties** and then executed
- While vendors solicitor receives the deposit and issues receipt
- Receipt of deposit and Better to make him receive deposit as a stakeholder.

EFFECT/ CONSEQUENCES OF EXCHANGE OF CONTRACT

- A binding contract and enforceable contract comes in place and the death of parties does not varies it
- Equitable interest passes to the purchaser
- Risk passes to the purchaser
- Vendor becomes a qualified trustee (it prevents him in dealing with the property in way inconsistent with the right of the purchaser). He is qualified because he is not accountable to the purchaser on any profit accruing from the property and exercise ownership over the property. He is not a full trustee.
- Vendor has a right of lien on the property in respect of the unpaid purchase price. Where the purchase fails to pay on the agreed date he can preclude him from possession.

ROLE OF SOLICITORS

WHEN CAN PARTIES USE ONE SOLICITORS? FACTORS TO BE CONSIDERED

- All the parties must give their consent
- The Title must be a sound one
- Major terms and conditions of the contract are already agreed upon
- There is no likelihood of conflict of interest in the transaction and
- The consideration is small (not always)- see **SMITH V MANSI**

ROLE OF VENDORS' SOLICITOR: Prepares the contract and advises the vendor

HOW VENDOR'S SOLICITOR MAY RECEIVE PAYMENT DEPOSIT:

- **AS AN AGENT:** he receives it on behalf of the vendor. Where he misappropriates the money, the vendor is liable to indemnify the purchaser**.**
- **AS A STAKE HOLDER**: he holds the money as a trustee for both parties. Not on behalf of the vendor.

IMPLICATIONS OF RECEIVING AS A STAKEHOLDER:

- He is not an agent of either party in respect of the money
- He is only a trustee of the money
- He is liable to pay the money to the party entitled at the end
- He has personal responsibility to keep the money safe
- Must keep it in client or trust Account

- Liable to pay no interest on the money
- He is liable in cases of misappropriation

REMEDIES AVAILABLE TO THE VENDOR IN CASE OF BREACH

- Action for Recovery
- Criminal Prosecution
- Professional Disciplinary Action

GENERAL REMEDIES FOR BREACH OF CONTRACT

- order for Specific performance
- Damages
- Rescission (where possible)
- Forfeiture
- Lien
- Declaration
- Injunction.

ILLUSTRATIONS OF THE TYPES OF CONTRACTS:

a. **ORAL-** minus minimum requirements of the law

b. **OPEN**- minimum requirement on the dot

c. FORMAL- minimum requirement + Special terms **and conditions**

REQUIREMENT/FACTORS FOR A FORMAL CONTRACT

1. **Possession before completion** (make it known that it is as a licensee or a tenant at will) so as to aid ejection in the event of default.
2. **Payment of deposit**. (it shows transaction is not gratuitous, shows commitment)
3. **Balance and interest on unpaid purchase sum** (it is to the effect that failure to pay balance on the agreed date, interest may accrue on the balance or that he may lose deposit)
4. **Capacity of the vendor** (status in which the vendor is conveying. E. lessee, mortgagee, beneficial owner)—it determine which implied term will accompany the transaction.

WHERE YOU TRANSFER AS A BENEFICIAL OWNER, IMPLIED TERMS INCLUDE

i. That the purchaser would have Quiet enjoyment/possession
ii. That the vendor has Right to convey or has a sound or good title
iii. That the purchaser has Further assurances
iv. the property is Free from encumbrances

- **IN A LEASE:** All the provisions of the lease has been complied with and Risk and insurance. or **That the head lease is valid and subsisting and that All the transactions (outgoing rents and rates) involving the head lease has been cleared**

5. **Date of completion (**date of execution of the deed): to circumvent the presumption of the law on reasonable term. It crystalizes the position of the party.

WEEK SEVEN

CONTRACT OF SALE OF LAND 2

AFTER THE EXCHANGE OF CONTRACT: The Responsibility of the vendor/vendor's solicitor to deduce title to land, It is the responsibility of the purchaser or his solicitor to **investigate** the title of the vendor.

DEDUCING TITLE: this is the vendor's act of proving his title to the property.

INVESTIGATION OF TITLE: the act of examining the veracity of the title deduced by the vendor.

DOCUMENT TO BE USED IN DEDUCING TITLE

- An executed copy of the contract of sale
- Abstract of title or epitome of title
- **ABSTRACT OF TITLE:** It is a review of previous owners, liens, encumbrances that have affected the devolution of title to land to the property over a period of time. In recital, referral is majorly done to the abstract of title. **NB: abstract of title is different from a recital because it reveals the lien and encumbrances on the property and note further that all the documents referenced in an abstract must be attached.**
- **EPITOME OF TITLE**: it is a schedule of documents and events which constitute the title and it is accompanied by photocopies of the documents. Where any of the documents relating to the title is lost, **the vendor may provide a CTC of such missing document and a statutory declaration of loss to that effect.** .

CONTENTS OF ABSTRACT/ EPITOME OF TITLE

1. Date of the document
2. Nature of the event
3. Parties to the transaction
4. Whether CTC or photocopy
5. Number of document
6. Whether original document will be handed over on completion.

NUMBER OF YEARS TO DEDUCE TILE

- In Conveyancing Act jurisdiction **at least 40 years**
- In Property and Conveyancing Law jurisdiction **at least 30 years**.

CLASS WORK

Mr. Abdulahi bought a plot of land at 13 Mary Street Agege Lagos from Mrs Judith. Draw up the abstract of title to the property.

DATE OF DOCUMENTS	NATURE OF TRANSACTION	PARTIES	Whether CTC or Photocopy	Number of documents	Whether original will be handed over on completion
	Sale of land	Mrs Judith(vendor) and Mr Abdullahi (purchaser)			

GOOD ROOT OF TITLE

- This is a document of title which is sufficient in itself without any extrinsic evidence to establish title to such land, See 63 CA, 88 PCL

FEATURES OF A GOOD ROOT OF TILE

1. It must convey both legal and equitable interest to the land.
2. It must give adequate description to the property as to make it ascertainable
3. It must clearly state/ describe the owner to make them ascertainable (adequate description must be give so as to forestall all doubts)
4. Nothing on the face of it must cast doubt on the authenticity (integrity) of the title and document
5. It must not be subject to a higher interest.

EXAMPLES OF GOOD ROOT OF TITLE

1. Deed of Assignment

2. Deed of gift **(consideration is not a condition precedent to good root)**
3. Deed of legal mortgage (it confers legal interest)
4. An Assent (a document transferring the ownership named in the will to the beneficiary) by personal representative.
5. Court vesting order
6. Registered title under LRL

EXAMPLES OF BAD TITLE

1. Lease
2. License
3. POWER OF ATTORNEY
4. Will
5. Equitable Mortgage
6. **All documents that cannot convey both legal and equitable interest**

When asked whether a certificate of occupancy constitute a good root of title say it depends. Certificate of Occupancy is not a good root of title because…it only raises an equitable presumption of title and can be defeated by a good title if presented. If a Certificate of Occupancy is given by the state as a **STATE GRANT**, it stands as a good root of title. **SEE OGUNLEYE v ONI (1990) and sections 5 & 6 LAND USE ACT and 34 and 36 LAND USE ACT. HOWEVER IT MUST BE STATED THAT: A C of O will be good root of title if apart from the C of O there are other documents attached that can prove the ownership of the land.**

REQUISITION

It is raised when there is need for clarification in the abstracts. Therefore it means raising of questions based on the abstract or epitome given by the vendor's solicitor on the property. Requisition helps in conducting investigation or in investigating a title. The investigation may be called searches.

QUERIES:

- **Basis of requisition? The abstract or epitome of title**
- **Who Responds? either the Vendor or His Solicitor**

Is it compulsory to respond to all requisitions raised? No, not compulsory, when raised on patent defects. It only becomes compulsory when raised on latent defects. NB: patent defect can only be seen physically not on the paper.

- **NB: REQUISITION MUST BE ON A LETTER HEADED PAPER.**

PROCEDURE FOR CARRYING OUT INVESTIGATION

It depends on the jurisdiction. In Abuja, there is the Abuja Geographic Information system (AGIS) and in Lagos, there is a similar method under the Land Registration Law of Lagos State 2015. In this two jurisdictions, searches are conducted via electronic methods at the Land Registry.

PROCEDURE FOR INVESTIGATION UNDER PCL AND CA STATES

1. Collect epitome or abstract of title from the vendor or his solicitor
2. Visit the following places for the purpose of search

❖ Land registry
❖ Court registry
❖ Probate registry
❖ Corporate Affairs Commission (when it includes a company)

3 Conduct physical search on the property
4 Closely study the documents of title
5 Closely study the epitome or abstract of tile
6 Investigate traditional history where necessary

7 Raise requisitions where necessary
8 Draft and send a search report.

SEARCH REPORT

1. With a forwarding/ cover letter: find attached the search report on a similar letter head too.
2. The search report AND THE LETTER ON THE SAME PAGE: **find below a search report of…**

CONTENTS OF SEARCH REPORT

1. Date of the letter
2. Date of search
3. Place of search
4. Name of the owner: owner of the property
5. Title of the owner: nature and
6. Description of the property
7. Encumbrance if any: flowing from the scenario and the nature of the encumbrance the purchaser can or should…
8. Comment/ observation: it flows naturally from the encumbrance
9. Name, address and signature of the solicitor who conducted the search

PROCEDURE FOR INVESTIGATION IN ABUJA

1. Written application to conduct search is made at the AGIS stating the particulars of the property
2. Application accompanied with letter of consent from the owner of the property
3. Show evidence of payment of search fee
4. Officers of AGIS would conduct the search and complete the search report

PILLARS OF INVESTIGATION

- Ensure that the seller has a right or authority to sell
- Ensures that no break in chain of devolution of the property
- Ensure that there is no exception, reservation, restriction or caution endorsed on it as to the title
- Ensure that the description in the title deed fits the land being purchased
- Look out for encumbrances on the title and what could qualify for patent defect
- Ensure all necessary consents have been obtained
- Ensure all charges are paid and duly receipted e.g. ground rent, tenement rate, land use charges, rent etc.
- Raise requisitions where necessary
- Where the purchaser is satisfied with the reply to the requisition he proceeds to prepare the deed of assignment.

CLASS WORK

Mr. JZ granted the unexpired residue in his property to Mrs. J. Mrs Jackie sold the land at 10 Edidi Lane Idumota Lagos to UNIMAID. UNIMAID obtained a C of O in respect of the property and later sold it to Mr. Ijesha, Mr Ijesha gave the property in his will to Mallam Sanni

REQUISITION TO BE RAISED

1. Year of grant by Mr JZ to Mrs J
2. Nature of transfer to UNIMAID
3. Date of transfer in the transactions
4. Names and particulars of the parties
5. Document of transfer by the parties
6. What nature of the C of O acquired
7. Nature of transfer to Mr ijesha
8. Number of documents used in transferring from the parties
9. Executors of the will of Mr Ijesha

10. where or whether there was a Letter of probate
11. Execution of assent
12. Certificate number
13. Description of the property sold from.

COMPLETION STAGE

❖ A completion statement will be made by the vendor's solicitor

CONTENTS OF THE COMPLETION STATEMENT

1. the exact amount outstanding
2. the exact date of taking possession
3. A schedule of documents to be delivered to the purchaser…

ITEMS TO BE COLLECTED BY THE PURCHASER FROM THE VENDOR ON COMPLETION

1. At least 4 copies of duly executed deed with plan attached
2. **All prior original title documents which relates to the land. Exceptions: - when the document relates to other land retained by the vendor, e.g. Power of Attorney relating to other land, when the documents creates trust subsisting. Documents that relates to appointment or discharge of a trustee of a subsisting trust in which the vendor will give an undertaking for issuance upon requirement by the purchaser.**
3. Receipts of payment of all outgoings e.g., tax receipt, water rates and electricity bill etc.
4. keys to the property if developed
5. 3 years tax clearance certificate of the vendor
6. Duly executed/ completed form for governors consent (called form 1c in Lagos state)
7. Expired Power Of Attorney where there is one
8. Approve building plan
9. Notice of assignment of insurance policy where there is one.

POST COMPLETION STAGE--- 22 LAND USE ACT

1. Obtain Governor's consent
2. Stamping ad valorem (the higher the consideration the higher the fee payment)
3. Registration of the deed in the Land Registry…**CSR**

DOCUMENTS TO BE SUBMITTED FOR APPLICATION FOR GOVERNOR'S CONSENT

1. 4 copies of duly executed DOA
2. Photocopy of CTC of Prior Deeds
3. Deposit of consent fee, charting and endorsement fee
4. Current three years tax clearance certificate of the parties,
5. Where a Corporate body is involved, then the evidence of PAYE return
6. evidence of payment of tenement rate or statement in lieu in the case of underdeveloped property, in Lagos State, evidence of payment of land use charges
7. payment of capital gain tax
8. receipt of payment of development levy
9. Covering Letter. (application): to forward all the documents

EFFECT OF FAILURE TO REGISTER

1. Not able to plead in evidence Ossai v Nwajide
2. Reduction in status of priority
3. It cast doubt to the authenticity of the document

Stamping: not registrable, not pleadable, penalty may accrue

APPLICATION FOR C OF O

a. Obtain an application form to be sworn before a magistrate
b. covering letter to the executive secretary Land use and allocation committee
c. 4 passports photographs
d. Receipt of the fees paid for processing land information i.e. charting the land
e. Submit receipt of the payment for the c of o form
f. Certificate of land information must be submitted
g. Current tax clearance of both parties.
h. Development levy
i. Receipt for publication, inspection ground rent, stamping registration
j. Photocopy of purchase receipt on which stamp duty has been paid
k. Special development levy receipt
l. Photocopy of approved building plan.
m. Land use charge receipt
n. Survey plan 3 cloth copies and 3 sun copies must clearly state the municipal…..

FORM AND CONTENT OF A DEED OF ASSIGNMENT

INTRODUCTORY

OPERATIVE PART

MISCELLANEOUS PART

CONCLUDING PART

- Commencement

THIS DEED OF ASSIGNMENT (is) made this ……..of …….20….

- Date
- Parties

BETWEEN; .of……. () AND……of…….. ()

- Recital if any

WHEREAS;

1……..

2……..

3…….

4…….

OPERATIVE PART

NOW THIS DEED WITNESSES AS FOLLOWS:

In consideration of the sum of -----() paid by the ASSIGNEE to the ASSIGNOR (the receipt of which the ASSIGNOR acknowledges), the ASSIGNOR as a BENEFICIAL OWNER assigns to the ASSIGNEE ALL THAT----------(description of the property) together with the appurtenances located at…….., covered by the Certificate of Occupancy dated----------and registered as—no------page no ------- vol no---------- in the Land Registry at……. TO HOLD the same UNTO the ASSIGNEE for the term unexpired on the said Right of Occupancy, subject to the provision of the Land Use Act, Cap. L5, LFN 2004

MISCELLANEOUS PART

COVENANTS

CONCLUDING PART

SIGNED SEALED AND DELIVERED by the within named Assignor

Clauses:

When the C of O can not be handed over to the purchaser because it covers more than the part the assignee has in the property. The clause of Acknowledgment For Save Custody and Undertaken For Production. Called

WEEK 8

LEASES AND TENANCIES I

It creates a grant of right of exclusive possession for a term of year certain in exchange for Consideration (money or money's worth). A lease is a document which creates a grant of right of exclusive possession of a property for a term of years in consideration of rent or money's worth.

TERMS AND PARTIES TO A LEASE

- **Demised property:** the subject matter of a lease usually a property
- **Term of years:** the duration of the lease, may be 3 years or above.
- **Lessor/Land Lord**: the grantor of lease hold interest
- **Lessee/Tenant: the** grantee of the leasehold interest
- **Guarantor/Surety**: a person who undertakes to guarantee the due performance of the covenants and terms of the lease. **NB: a guarantor is only needed only if the lessor is unsure as to whether the lessee will fulfil the terms of the lease. A guarantor for a company is likely to be the director or secretary but in accordance to the provision of CAMA or the articles of the company …**

ESSENTIALS OF A VALID LEASE

- **Certainty of party**: parties must be adequately described and defined. Parties must be juristic persons with capacity to sue and be sued. The parties must not be minor, bankrupt, insane or an unincorporated entity.— see section 7 Land Use Act
- **Certainty of property:** the property must be identifiable, ascertainable and adequately described.
- **Certainty of term**: the property must be in existence at the commencement date of the lease. The description of the property must be full, accurate, clear, and identifiable.
- **CERTAINTY OF DURATION: The lease must take effect on a specific date**. Where parties intend that the lease takes effect upon the happening or occurrence of a future contingency, parties to the lease must have agreed
- **It must be created in due and proper form**
- **Exclusive Possession**
- **It must be in writing**

NB: if the commencement of a lease is tied to a future event, the future event must be ascertainable. See the cases of **Okechukwu v Onuorah (2000) 12 SCJN 146 and UBA V Tejumola & Son (1988)**

LEASE	**ASSIGNMENT**
there is reversionary interest	No reversionary interest
lessor/ lessee	Assignor/Assignee
Deed Of Lease	Deed Of Assignment
Lease Agreement	Contract Of Sale
Interest for a term of years	unexpired residue

A licensee who stays in an apartment lacks exclusive possession, he can be thrown out at will.

LEASE	**LICENCE**
There is exclusive possession	no exclusive possession

LEASE	**TENANT**
Deed Of Lease	Tenancy Agreement
Above three years	three years and below
Lessor/Lessee	Landlord/Tenant
Governor's consent	Not needed
Lessor's solicitor	Landlord's solicitor

FORMAL PARTS OF A LEASE

Before the introduction of the land use Act, there is free hold. The lands bought before the promulgation is freehold and it is still retained afterward.

To know it is a freehold? If the question did not indicate certificate of occupancy.

FREEHOLD-LEASE-SUBLEASE-UNDER LEASE

LEASE HOLD- SUBLEASE- UNDER LEASE.

Recital is mandatory in a lease where the grantor of the lease is not the owner of the property.

Testatum: it introduces the operative part;

WHEREBY THE LESSOR AGREES TO DEMISE UNTO THE LESSEE

WHEREBY THE LANDLORD GIVES AND THE TENANT TAKES

IT IS AGREED AS FOLLOWS

Parcel Clause:

NB: where the location of the demised property is necessary otherwise it becomes unascertainable, the lease will be void.

An infant can be a party to a lease transaction, the transaction is voidable, it can be voided by the infant on majority.

Habendum: the term granted by the landlord. A lease must specify the duration of the term by reference to either:

A fixed term e.g 5 years or

A periodic term e.g yearly, quarterly, monthly or weekly

The duration is usually denoted by the words for a period of ……. Or on a weekly/monthly/yearly tenancy or by words to that effect.

COMPUTATION

Commencing from……..excludes the date mention e.g from January 1st 2015= it terminates on 1st January 2016

Commencing on: include the date mention e.g on January 1st 2015= it terminates on 31st December 2016.

REDDENDUM

This is the part of the lease that defines the amount of rents payable. It is usually denoted by this words: "yielding OR paying yearly the sum of N…..being rent for the ……term".

Rent is the consideration paid for the use and occupation of the property and it is paid periodically by the tenant to the landlord. It must be stated that rent is payable in advance or arrears. Where it is not stated, it is payable in arrears.

RENT CLAUSE

"Yielding or paying therefore yearly, during the said term granted, a rent of N…… clear of all deductions by yearly payment in advancement, the first of such payment to be made on the….."

- Content: amount and period of rent and mode of payment

TYPES OF RENT

Ground Rent: payment for the land without considering the development on the land. It may be paid:

1. To the governor if you are the owner (holder of a right of occupancy)

2. It can be paid to the land lord who in turn pay to the governor. Section 5 of the Land Use Act.

Ordinarily, a land owner or lessor pay the ground rent.

Rack Rent

It is the rent paid by the lessee to the lessor considering the development on the land. It is paid on development of the land. It is not static. It is also called ECONOMIC RENT. It is determined by:

1. location of the property
2. Quality of the property
3. The investment on the property
4. The use if the property.

Premium/fine

A lump sum of money paid in consideration of a reduced rent. It is also called a fine. Rent will still be paid but at a reduced rate.

It is not allowed in all the jurisdiction of Nigeria.

Disadvantages

1. Inflation
2. Statutory prohibition
3. Payment of tax: rent collected in advance for more than five years is subjected to taxation as income. Section 3(3) PITA; Section 4(2)(c) of ITMA.

Habendum= Duration

Redenddum: Rent Paid.

RENT REVIEW CLAUSE (cushion the effect of inflation)

The rent review clause allows periodic review of rent and it is advisable for long term lease. It is important to insert a rent review clause in a lease especially if the term of years granted is a long one. In the absence of such clause See UNILIFE DEV.CO LTD V ADESHINGBIN (2001) FWLR (PT 42)114

" the rent shall be subject to review at the instance of the sub-lessor by adding to the existing rents through the issuance of a 2 months prior Notice by the sub-lessor to the sub-lessee, such review exercisable every 2 years during the subsistence of the lease and the new rent to be reviewed shall be calculated having regards to the market value, inflation, level of use and other future rates and charges attached to the demised premises and any dispute arising from the review of the rent shall be settled by negotiation between the parties to be referred to an arbitrator appointed by the chairman of the Chartered Institute of Arbitration "

CONTENT OF A RENT REVIEW CLAUSE

- Method of initiation of the review: e.g issuance of notice and the duration of such notice.
- Time frame for the review: e.g every 2 years
- Method of calculating the new rent
- Procedure for dispute resolution concerning the new rent.

WEEK 9

LEASE PART II

COVENANTS

TYPES OF COVENANTS

Express: those covenants expressly provided for in the lease agreement. It cannot be implied. E.g. Covenant as to use:

- Implied: parties will be bound by covenants that will necessarily follow the transaction. It includes;

a. Quite enjoyment/ exclusive possession
b. Payment of lease
c. Not to commit waste
d. Pay rent where applicable

Usual covenants: a question of fact to be determined by the court. At times, statutes prescribed usual covenants. It may as well be the custom and tradition of a particular tenancy relationship.

COVENANT TO PAY RATES AND OUTGOINGS

- Charges paid in respect of the demised premises.
- Who is bound to pay? Either of the parties can have the responsibility, it is not implied hence, the person to pay must be stated.
- **Types:**

a. Recurrent: periodical charges, e.g, electricity bill, waste and disposal, water etc. the ones paid from time to time. Usually the lessee paid for recurrent.
b. Non- recurrent: e.g NEPA METER, i.e charges paid at ones not periodical. Lessor usually pays the non-recurrent charges. See SMITH V SMITH (1939)

Drafting a standard ideal covenant: It depends on who the person is acting for

NB: ordinarily, the tenant is bound to pay only rates that are in existence at the time of the commencement of the lease agreement not subsequent ones. Hence when drafting, be express as to whether the lessee is bound by future or subsequent rates that will be attached to the property

'to pay all taxes, rates and outgoing and whenever payable in respect of the demised premises'

NB: when a new rate is introduced which relates closely to the existing property, the lessee will still be bound. SMITH V SMITH

At times, statutes fixed payment of rates and outgoings = sections 7(2) and 8(2) of Tenancy Law of Lagos state 2011.

USER COVENANT

The use to which the property will be put and if not expressly stated will include any lawful use of the property by the lessee. i.e can be used ,for any purpose as long as it is legal. DAWODU V ODULAJA.

Use

- Residential
- Commercial
- Agriculture
- For any legal purpose
- All should be stated disjunctively

Factors to consider for purpose of Use

a. Locality of the property, the use of the area

b. The regulation in the area
c. Be clear and avoid ambiguity.

COVENANT TO REPAIR

- Who is to bear? Depends on the agreement between the parties and must be implied on the face of the lease. But in a short lease, tenants bears the responsibility usually.
- How construed
- Things to note: **(external repair) Fair wear and tear, Age of the property, locality and structure** (other things that goes to the foundation of the building, it should be the responsibility of the Landlord ordinarily) and **internal repair** (for lessee).
- At times, if the covenant is hinged on the landlord, notice must be given to him and in the pursuance of the goal of repair, he have a right to enter and it will not amount to infringement of the right to exclusive possession.

Draft: "To keep the demised premises……..."

COVENANT AS TO ASSIGNMENT OR SUBLET

- Where it is not provided for, tenant can assign or sublet. See INUWADA V BRYNE
- Absolute bar: ***not to assign or sublet***. Ordinarily it is a bar
- ***Not to assign or otherwise part with the demised premises***. Tenants will only be guilty if he parts with the legal possession. See ISHOLA WILLIAMS V T.A. HAMMOND PROJECT LTD. So also, he will not be guilty if what is transferred is an equitable assignment. Parting only means transference of the legal interest
- Clause: ***not to assign, underlet or otherwise part with possession of the demised premises without the written consent of the landlord***. It is **majorly to protect the reversionary interest in the property**. It gives the landlord the power of controlling who will come unto the property.

IDEAL COVENANT ON ASSIGNMENT: it protects the rights of both parties

- "**Not to assign, underlet or otherwise part with the possession of the demised premises without the written consent of the landlord such consent not to be unreasonably withheld in the case of responsible and respectable person"**

NB: where he refuses to grant consent, he is not bound to give reason for refusal.

Things he is to consider: ***the personality of the Sub-lessee/assignee and the use in which the property will be put***. See **ALAKIJA V JOHN HOLT**, CURTIS MORFELT V WHEELER, IDEAL FILM RENTING CO V NELSEN.

COVENANT TO INSURE

Either of the parties have insurable interest in the property and may take the property to insurance.

Things to consider

STANDARD INSURANCE COVENANT

CONTENT

1. Who is to insure?

a. Existing obligations: whether to insure under a different agreement. E.g where the landlord is also a mortgagor with respect to the property, under the agreement, if the mortgagor have an obligation to insure the property. Hence, he must insure the property in the lease agreement. i.e, where the party have an obligation under a different agreement but affects the demised premises.
b. Nature of the property: where the property are joined together or where the property to be demised is a part of a whole property, it is advisable that the Landlord insure the property.
c. Other provision in the lease: e.g provisions on payment of service and rent charges. The landlord should insure.
d. Use of the property: if the tenant is to use the property for risky business, the tenant should insure.

2. The Risk to insure: e.g insurance should be against fire, water. Risk includes likely causes of destruction for the property. You can say: "to take a standard insurance policy with……."

NB: where the tenants has the responsibility of taking a standard insurance policy with a named company and the company insurance policy does not include cause of the destruction. The tenant will not be liable. See UPJOHNS V HITCHEN

3. **The underwriting company:** a reputable insurance company is a question of fact. It must be stated or leave in blanket subject to defined condition.
4. **Amount of cover:** make a comprehensive amount of cover. See BANDER PROPERTY HOLDING LTD V DARWELL LTD.
5. **Application of the insurance money:** it must be stated. Ordinarily where the landlord insured, he cannot be compelled to use the money for re-instating the destroyed property. Under common law, where the tenants pays the landlord, he can compel the use of the money.

❖ Not the essence of section 67(1) of the Insurance Act, where an insured property is destroyed by fire alone, the person having interest in the property, can apply for the use of the insurance proceed for reinstatement of the insured property.
NB: where reinstatement is not possible? The party may be indemnified.

6. make provision for abatement

OPTION TO RENEW/ COVENANT FOR RENEWAL

1. It is the Landlord responsibility
2. Note the different between rent review (goes to rent within the tenure of the lease) and option to renew (it attacks the life of the lease, tenure, i.e option to renew after the termination of the tenure of the lease)

CONTENT

❖ When to give notice: when the tenant will give notice of his intention to renew. Usually before the expiration of the term of the lease, e.g, it may be three or six month notice.
❖ Mode of giving notice, usually in writing
❖ Condition precedent: e.g the conditions to be met before grant of renewal. E.g. not in breach of any covenant usually in the existing lease
❖ Terms: may be on same terms as existing lease. **Take note to EXCLUDE rent** and option to renew. This is for the purpose of negotiating the rent base on the current value of the property and to forestall perpetual renewal. See IITA V KHAWAM

Draft:

"the landlord shall on the written request of the tenant made 6 months before the expiration of the term hereby created, grant to the tenant the lease of the demised premises for another term of 3 years from the expiration of the term hereby granted at a rent to be agreed and containing all the terms and conditions of this lease except the option to renew"

See RE-HOPKINS (1972) 1 ALL E.R 248. See

DETERMINATION OF LEASE

1. Expiration of the term of the lease
2. Notice: e.g Notice to quit
3. Forfeiture, if there is a breach of any of the covenants in the lease
4. Surrender, landlord surrenders to the person with the immediate reversionary interest
5. Merger, the tenants merge with the landlord.

REMEDIES

1. Specific Performance
2. Damages
3. Forfeiture
4. Re-entry

PROVISO

- Condition in a lease that will preclude absolute terms, e.g proviso on abatement or restriction of the rent, forfeiture for breach or non-payment of rent.
- Provisos must be expressly stated e.g for forfeiture, it cannot be exercised impliedly.
- There must be condition precedents for the exercise of the right
- "if the rent hereby reserved or any part thereof shall or anytime remain unpaid for 21 days after becoming payable whether formally demanded or not or if any one or more of the covenants on the tenant's part…. "

FORFEITURE FOR BREACH OF OTHER COVENANTS

FORM AND CONTENT OF A LEASE

5. Introductory part
6. Commencement and date
7. Parties
8. Recitals
9. Operative Part
10. Testatum: WHEREBY THE LESSOR AGREED TO DEMISE AS FOLLOWS:
11. Parcel clause
12. Habendum: the term of year, the commencement and termination date
13. Redendum, rent clause
14. Miscellaneous Part
15. Covenant
16. Concluding Part
    Testimonium
    Execution and Attestation

WEEK 10

MORTGAGES PART I

MEANING

Generally, mortgage simpliciter means conveyance of land or assignment of chattel as a security for the repayment of a debt or discharge of other obligation for which it is given, with a provision for redemption on repayment of the loan or discharge of such other obligation. See the case of **SUBERU V AISL**. **NB: A mortgage is not necessarily borrowing of money.** It is a conveyance of a property as security for a debt as held in Intercity Bank Plc Feed and Food Farms Nigeria Ltd (2002)

It must be noted that it need not be the borrowing or lending of money, it is important that there is an obligation that arose as a result of the transaction between the parties. Thus, an obligation to repay a loan. When the mortgagor transfers interest in his or other person's property to secure the performance of an obligation with a condition that as the obligation is performed, the title to the property will revert to him or the other person it is thus a mortgage

IT INCLUDES AS FEATURES:

1. Existing obligation owed (to the mortgagee)
2. The mortgage Property
3. Transfer of the interest in a property as security
4. The transfer must be for the purpose of securing the performance of the obligation (from the mortgagor)
5. There should be a Proviso for reversion of interest upon fulfilment of the obligation (proviso for cesser upon redemption)

Mortgage= actual transfer of interest in the property for the performance of an obligation.

Note that mortgage and sale are different. In sale there is permanent transfer but in mortgage there is provision for redemption …

Charge= it is an agreement to use the property for the purpose of securing the performance of an obligation without transfer of interest. In charges: a borrower gives to a lender a part or the whole of his property to guarantee repayment of a loan. See **SUBERU V AISL LTD, OLOWU V MILLER BROTHERS (LIVERPOOL) LTD, SATLEY V WILDE**

TYPES OF SECURITY FOR LOANS

1. **Land (most preferable)**
   a. Value of land appreciates
   b. Land is immovable thus can be easily visited and verified
   c. Title to land can be easily investigated
   d. It is not easy to perpetrate fraud with land
   e. It is easier to enforce securities in land than other securities
   f. It is more durable, and reliable
2. **Debentures**
3. **Insurance securities**
4. **Guarantees**
5. **Stock and shares**
6. **Charge over fixed deposit account**
7. **Trust Receipts**
8. **Bill of Sale**
9. **Letter of Set-off**
10. **Trust deed**

TERMS USED IN MORTGAGE

- Mortgagor- the borrower in a mortgage transaction
- Mortgagee- the lender in a mortgage transaction

- Loan agreement (drafted at the contract stage)
- Legal mortgage: the deed of legal mortgage used to complete the transaction.
- Guarantor (brings property)/surety{stands by himself for the loan} (in tripartite mortgage arrangement, the property of the mortgage is not that of the mortgagor it may be that of the third party)
- Security/collateral (things or person that stand as assurance that the obligation will be discharged). NB: as a at the time legal mortgage have not been created it is called—property or Mortgage property
- **CHARGE**: agreement to use the property for the purpose of securing the performance of an obligation without transfer of interest.

APPLICABLE LAWS

1. Mortgage and Property Law of Lagos State, **2015**
2. Land Registration Law of Lagos State
3. Land use Act, 2004
4. Constitution of the Federal Republic of Nigeria, 1999 as amended
5. Land Instrument Registration Laws of various states (save Lagos where Land Registration Law 2015 has repealed the Land Instrument Registration Law)
6. Conveyancing Act, 1880
7. Property and Conveyance Law ,
8. Stamp duties Act
9. Illiterate Protection Act/ Law (where applicable)
10. Case Law or judicial precedent
11. principles of equity and common law

MORTGAGE INSTITUTIONS

** Federal Mortgage Bank (Federal Government agency, assist people to build house ...) (most preferable)

ADVANTAGES

1. It gives long term loan
2. Has low interest rates
3. Gives large sum of money, up to 66%, to complete the building
4. Has several branches spread across the country for easy accessibility.
5. It has the backing of the government

OTHER MORTGAGE INSTITUTIONS

** Housing Corporation

** Commercial banks

** Finance Bank

** Insurance Companies

** Private Property Developer

** Government and Employers Housing Scheme

** Life Endowment

** Mortgage Banks

NATURE OF A MORTGAGE TRANSACTION

1. Mortgagor borrows money for building of a property and uses the property as a collateral (a kind of mortgage transaction subject to contract)
2. Mortgagor borrows money for another purpose and uses his or another person's property as securities for the loan

3. Mortgagor borrows money and uses another person's property as a collateral/security
4. Mortgagor borrows money and somebody stand as a guarantor/surety.

CONTRACT SUBJECT TO MORTGAGE

This is used to refer to a contract for the sale of land made subject to the borrower/purchaser obtaining a loan. Usually provides that in the event that the loan is not obtained, the contact shall become void and vendor shall return deposit collected from purchaser. It will be provided for in the sale of land agreement. It is therefore a sale of land transaction.

CONDITION FOR VALIDITY OF CONTRACT SUBJECT TO MORTGAGE CLAUSE

a. Must state the source of the loan
b. Must state the terms of repayment of the loan
c. Must state the interest payable on the loan
d. State what happens when there is a default.

EXAMPLE OF THE CLAUSE

"this contract of sale of land is conditional on the purchaser obtaining a mortgage from BETTER CLAUSE LTD in the sum of N 40,000 000.00 (Forty million naira only) with interest payable at the rate of 12%. PROVIDED THAT where the loan is not obtained on completion, this contract of sale shall be void and the purchaser shall be entitled to return of the deposit paid"

Possession is not necessary for a mortgage transaction to take place.

MORTGAGE AND RELATED TRANSACTION

1. **PLEDGE**: it arises out of a particular agreement only differs in inability to exercise power of sale in the default of the borrower to pay the money borrowed. They are similar in all force; both are form of contact with virtually same ingredient. No possession, no pledge (transfer on interest is not enough, the property must be in possession of the pledgee). **Transfer of interest in mortgage will suffice and there is no need for possession.**
2. **LIEN**: (it is a qualified right of possession over the property of another) it does not arise out of agreement between the parties, it is a right given to the *lienee* in law to hold unto the possession of the property as a securities for an obligation owed to him by the lienor. Mortgage arises by agreement between the parties via a contract. The lienee does not have the power of sale over the property. The mortgagee have power of sale. No interest is transferred. An interest in the property is transferred under a mortgage property. There is proviso to cesser upon fulfilment/redemption.
3. **(CHARGE):** (there is no ownership) setting out a property as a security for the purpose of fulfilment of an obligation. **No interest in the property is transferred.** When a mortgage is by way of charge, you can charge many properties in a single document. Mortgage is accompanied by transfer of property rights whilst a charge is an appropriate of specific property for the discharge of an obligation without transfer of title for the property. *Chargee* only has limited right over the property and charge may be created as a result of operation of law.
4. **SALE**: the difference is only proviso for cesser on redemption.
   Once a mortgage is always a mortgage. See Owoniboys Technical Service Ltd v Union Bank of Nig Ltd.

c. The mortgagee reserves the right in some instances to sell the mortgage property where the mortgagor defaults in his obligation under the mortgage.

STAGES IN A MORTGAGE TRANSACTION

1. **Negotiation of the loan:** (as to the amount to be advanced and the property to be used (value of the property), the terms and the condition of the mortgage)
2. **Investigation (investigating the title to the property may be if it is that of the mortgagor/owner)** encumbrances, nature of interest, genuineness of the title, determine the extent of mortgagor' right to sell, suitability of the property for the transaction)
3. **Search report prepared by mortgagee's solicitor**
4. Valuation of the proposed property (to know the actual value of the property, it is always done by an estate valuer by estate experts)

5. **Loan Agreement** (preparation and execution. It creates an equitable mortgage)
6. **Documentation**- Preparation and execution of a deed of legal mortgage (only applicable in legal mortgage)
7. Execution of the deed
8. Perfection of title.

INVESTIGATION OF TITLE

- Conducted by mortgagee's solicitor (to ascertain genuineness of borrower's title in proposed mortgage property).
- Method of investigation similar to sale of land
- Where it is a corporate body: the matters should be done or investigated at the CAC, Date of incorporation , borrowing powers of the company, particulars of a company's director, whether annual returns are filed up to date, whether there is any registered charge or encumbrance.

STEPS TO BE TAKEN FOR INVESTIGATION

1. Collect epitome or abstract of title from the vendor or his solicitor
2. Closely study the epitome or abstract of tile
3. Visit the following places for the purpose of search

a. Land registry
b. Court registry
c. Probate registry
d. Corporate Affairs Commission (when it includes company)

4. Conduct physical search on the property
5. Closely study the documents of title
6. Investigate traditional history where necessary
7. Raise requisition where necessary
8. Draft and send a search report.

CREATION OF MORTGAGES

Types of Mortgage

1. Legal Mortgage
2. Equitable Mortgage

LEGAL MORTGAGE

Legal mortgage is created pursuant to statutory provisions; usually by Deed. But the nature of the interest of the mortgagor has a great deal on the transaction and it creation … the bank has the power to retain the original title.

It depends on the property law jurisdiction

1. Conveyancing Act states
2. Property Conveyancing Law states
3. Land Registration Law of Lagos 2015 and Mortgage and Property Law of Lagos state

MODES OF CREATING A LEGAL MORTGAGE UNDER THE CONVEYANCING ACT

1. **BY ASSIGNMENT** with a proviso for cesser upon redemption

- All the unexpired residue is transferred to the mortgagee (all that is remain of interest in the land) with a proviso for reversion on redemption
- The mortgagee has a right to retain all the title document
- No reversionary interest in the mortgagor
- In a mortgage by assignment, even though there is no privity of contract, there is presence of privity of estate between the head lessor and the mortgagee. Hence all the restrictive covenants on the property bind the mortgagee or any subsequent possessor of the property.

- **Creation of successive legal mortgage is impossible.**
- In an assignment there is privity of estate
- Can enforce beneficial covenant in the head lease **Applicable only in Conveyancing Act jurisdictions**
- **It is guided by the common law doctrine of *interessee terminee applicable to Convayancing Act***

2. **SUB-DEMISE** of terms of years less at least one day subject to cesser upon redemption.

- No privity of contract and privity of estate. Hence the mortgagee is not bound by the restrictive covenants and,
- Also, the beneficial covenants cannot be enforced.
- The unexpired residue is transferred at least with a day less subject to cesser on redemption
- There is reversionary interest (days left not assigned) only a term of years is used as a security.
- The problem is as to the reversionary interest, how to deal with it …
- Mortgagor can create a successive legal mortgages on the property, legal due date of the second legal mortgage must be a day later than the first legal mortgage.
- Common to all jurisdictions, there is uniformity

ADVANTAGES OF ASSIGNMENT OVER SUB-DEMISE

1. All interest in the property is not transferred to the mortgagee
2. Mortgagee has right to retain the title documents

Implication of Transferring As Sub-Demise

- Not advantageous to the mortgagee in the case of default by the mortgagor, power of sale cannot be exercised
- The mortgagor retains some interest in the property

Agreed date of payment (deadline of payment): Legal due date.

3. **STATUTORY CHARGE OR STATUTORY MORTGAGE: Taking Care of Reversionary Interest In A Sub-Demise For The Benefit Of The Mortgagee In Mortgage And Property Law And Property And Conveyancing Law Jurisdiction.** If the mortgagor defaults, the interest with him will automatically merge with the mortgagee's interest. (112 of PCL) No equivalent provision under the CA, so generally the mortgagee cannot sell the property to redeem his money but he can do that:

IN CONVEYANCING ACT JURISDICTION: at the creation of the legal mortgage inserts remedial devices:

- Insert irrevocable power of attorney clause: it enables the mortgagee to act as an attorney and sell the property to get back the principal and the interest on the sum given and remit the remaining proceed if any left to the mortgagor. E.g. the mortgagee can deal with the property in a manner the owner can deal with the property. He sells the property as an attorney.
- Declaration of trust: by creating a trust in the legal mortgage; the mortgagor is appointed as the trustee of the reversionary title, and then if he defaults, the mortgagee as a beneficiary may sack him and hence the interest fall back to the bank and merge with the initial interest to form an absolute interest.

CREATING A SUBSEQUENT LEGAL MORTGAGE IN A SUBSEQUENT

Note: a reversionary interest is a legal interest

Can the mortgagor create subsequent legal interest? It depends on the jurisdiction of the property.

Under the PCL and MPL, it is possible (proviso, the subsequent mortgage must be longer in termination date/legal due date than the first legal mortgage with at least a day longer).

Under the CA jurisdiction, it is not possible: because the common law principle of *interesse termini* (interest have been terminated) which is to the effect that, once a legal mortgage is created in respect of a property, the mortgagor's interest in that property is automatically terminated subject to the fulfilment of the obligation on the property. Hence, a subsequent mortgage with a different mortgagee cannot be created in respect of the property. Reason: because CA is a common law principle.

EXCEPTIONS

- **Creating a second legal mortgage with same mortgagee**
- **Creating a second equitable mortgage on the property.**

Statutory Charge: this is often applicable in the PCL and MPL jurisdictions where parties adopt a statutory format in the creation of legal Mortgage. The forms are contained at the appendix to the PCL and MPL. A mortgage created via statutory charge may easily be discharged by a mere receipt.

MODES UNDER PROPERTY CONVEYANCING LAW

1. Sub-demise
2. Statutory charge
3. Charge by deed expressed to be by way of legal mortgage

MODES UNDER MORTGAGE AND PROPERTY LAW OF LAGOS STATE AND LAND REGISTRATION LAW OF LAGOS STATE see sections 15, 16 and 18 PML

It depends on the interest of the mortgagor

1. **Demise**
2. **Sub-demise**
3. **Charge by deed expressed to be by way of legal mortgage**
4. **Charge by deed expressed to be by way of statutory mortgage**

THEREFORE: There are six methods of creating legal mortgage in Nigeria.

ADVANTAGES/DIFFERENCE OF CHARGE OVER SUB-DEMISE & ASSIGNMENT

1. Charge is simpler to create and discharge
2. In a charge there is no transfer of interest in land, therefore convenience for business efficacy but in sub-demise little interest is transferred while in assignment all the interest is transferred.
3. Charge is convenient for mortgaging mixed properties in a single document..
4. Will not offend the rule against assignment of a lease if inserted in the head lease (covenant against assignment will not be offended if no term to the contrary is included in the head lease).
5. It is vacated/discharged by mere receipt of payment while in assignment and sub-demise **Deed of release, deed of re-conveyance, deed of surrender**
6. The *chargee* has all the powers, right and protection of a legal mortgagee

DISADVANTAGE

1. The receipt of release is not registrable hence it will operate as if the encumbrance earlier created is not yet discharge.

SIMILARITIES

The mortgagee is entitled to retain all the right over the property.

DOCUMENTS REQUIRED PERFECTING A LEGAL MORTGAGE:

A. Certified true copy of the original title document
B. 5 copies of the duly executed mortgage deed
C. Three years tax clearance certificate of the mortgagor and the surety, if any
D. A receipt of payment of outgoings
E. A duly completed application for governor' consent form (form 1c in Lagos)
F. Payment of charting, endorsement and consent fees
G. Any other document as may require.

WHERE THE MORTGAGOR IS A COMPANY THE FOLLOWING ARE REQUIRED:

1. A certified true copy of Memorandum and articles of association of the company
2. A copy of the resolution of the Board Of directors authorising the mortgage
3. A copy of the Certificate of incorporation
4. Tax clearance Certificate for at least two directors

CREATION OF EQUITABLE MORTGAGE

MODES are common to CA and PCL states

1. Deposit of title accompanied by memorandum of deposit evidencing the transaction
2. Where borrower's interest in property is equitable e.g. a beneficiary's right under a trust. A subsequent mortgage after a legal mortgage in conveyance act states
3. By an agreement to create a legal mortgage
4. By an equitable charge
5. By an inchoate legal mortgage e.g. failure to obtain consent or to register, does not meet the requirements of the law. In Lagos section 18 MPL:

ADVANTAGES OF LEGAL MORTGAGE OVER EQUITABLE MORTGAGE

A. Easier to enforce
B. Legal mortgage without notice of an earlier equitable mortgage takes priority over the equitable mortgage
C. Easier to commit fraud in the case of equitable mortgage than in legal mortgage

N>B> the extent of the steps to be taken for the purposes of perfecting will depend on where the property is located, the general procedural steps of consent, stamping and registration applies throughout the federation.

Where a company is involved, under section 197 CAMA, there is an additional provision: every mortgage on charge created by a corporate body must be registered with the CAC within 90 days of the mortgage, but failure will render the mortgage void. **CREATION OF EQUITABLE MORTGAGEE**

WEEK 11

MORTGAGE II

UP-STAMPING

NB: kindly note that up-stamping is different from Successive legal mortgage.

When a mortgage is created by Assignment, you cannot create a successive legal mortgage. This is because in a **successive legal mortgage the mortgagor is the same and the mortgagee is different**. No successive legal mortgage using the same property for another mortgagee in the CA Jurisdiction.

In up-stamping, **you create a successive mortgage in respect of the same property with same/initial mortgagee. Only a new Stamp-duty will be assessed and paid in respect of the second mortgage.**

When governor's consent is not necessary in a mortgage transaction

FEATURES OF UP-STAMPING

- Same property
- Same parties
- Facility (loan) is new (there must have been an earlier mortgage on the same property)
- Stamp duty is paid on the new facility. No need to draft a new deed.

NB: up-stamping is not the same as successive legal mortgage.

RIGHTS AVAILABLE TO THE MORTGAGOR

1. **EQUITY OF REDEMPTION**: simpliciter the right to redeem the property is inherent for the mortgagor anytime he satisfies the obligation. It gives right to continue to answer the owner. The inherent right to remain the owner of the mortgagor as long as the mortgage transaction still subsists or is in its existence. It can be exercised either the mortgagor or anyone having any interest in the property. **It cannot be limited to time**. Therefore once a mortgage is always a mortgage. It is borne when the mortgage is created and it dies when the mortgage dies. Equity of redemption and mortgage are like Siamese twin. **NDABA v UBN**
2. **LEGAL RIGHT TO REDEEM:** the **mortgagor's right to have his property back at the end of the agreement the right is in law**. It is tied with the legal due date. If he doesn't redeem on the legal due date, he will be deemed to have lost his right to redeem. **If the legal due date is not specified, it will be due on demand**. Where the mortgagor keep servicing the loan as contained in the Agreement between the parties, any notice to pay at an earlier date does not have any side effect on the mortgagor. In the contract to recover his property after discharging obligations. The legal right to redeem is tied to the legal due date usually six months. It is often construed strictly. It is the first son of equity of redemption. Therefore equity follows the law.
3. **EQUITABLE RIGHT TO REDEEM**: it **arise if the legal right to redeem have passed**. The bank or the mortgagee is only interested in the mortgage sum and interest, that is why equity intervened.

- The mere fact that the legal due date has passed should not stop the owner to redeem in equity. It is an equitable interest that cannot be taken from the mortgagor even though a mortgage exists.

In duration: equity of redemption from the beginning to the end

Legal right to redeem: closes upon the closure of the legal due date

The equitable right to redeem begins after the expiration of the legal due date

Once a mortgage always a mortgage: It remains with the mortgagor notwithstanding the legal interest in the mortgagee. It goes with the property notwithstanding the mortgage. It is extinguished in case of order of sale and foreclosure. Any clause ousting the right or equity of redemption will be considered inconsistence with equity. Where in possession, note s 18 CA and s 131 PCL

RIGHT OF THE MORTGAGEE

ON RECOVERY OF THE PROPERTY

1. The right of action in court for mortgage sum and interest
2. Right to take Possession
3. Right to appoint a receiver
4. Right of sale of security (power of sale)
5. Right to an order of Foreclosure
6. Alternative Dispute Resolution
7. Right to action for the Creditors voluntary winding up pursuant to s. 408 and 409 CAMA, where the mortgagor is a company.

NB: all the rights are cumulative. However, note the effect when the action for foreclosure is used as the first remedy. It preclude the use of other remedies.

ACTION FOR THE MORTGAGE SUM

Action is taken as a creditor, to recover mortgage sum and interest. This is based on the mortgagor's personal covenant to pay as contained in the mortgage deed. UBN v OLORI MOTORS

TAKING POSSESSION

- Right available to a legal mortgagee
- Strict liability of account for rents and other profits received from the property.
- The mortgagee should take it advisedly.

APPOINTMENT OF A RECEIVER

A receiver is a person appointed by the mortgagee to sell the property. So as to fulfil the obligation.

This is more common in mortgages by companies…. Debentures.

S 9 (1)(iii) CA s 123(1) PCL, 43 (5), MPL Section 393 CAMA (only the mortgagee can sack the receiver)

- Available to every mortgagee where the mortgage was created by deed
- A receiver can be appointed in cases where the right of sale arisen

Receiver is appointed by the mortgagee but usually seen as agent of the mortgagor. (note the implication of this: any liability by the receiver goes to the mortgagor). Usually appointed after the legal due date has passed. he can be appointed :

a. By the agreement of the parties
b. Express provision in the legal instrument
c. Appointment by the court
d. Appointment under a power given by a statute.

In a legal mortgage: Section 12 PCL, Section 19 CA see section 43 MPL

SEE AWOJUGBAGBE V CHINUKWE.

FUNCTIONS OF A RECEIVER

- Take the property out of the possession of the mortgagor
- Use the income that accrue from the property towards offsetting the mortgage sum

POWER OF SALE OF SECURITY

Available to the mortgagee in all mortgages created by deed (legal and equitable) see SHORUNMU v DOLPHIN Section 123 SS. 19-22 CA; 123-129 PCL and 37 MPL. Only applicable to a legal mortgagee. Not applicable to equitable mortgagee in an equitable mortgage save where the mortgage is created by deed and remedial devices included.

CONDITIONS

1. **POWER OF SALE MUST ARISE or HAVE ARISEN**

- The Mortgage must be by deed
- Date of repayment must have passed/instalment due
- No contrary intention against the sale in deed. (all the conditions are cumulative, must be construed conjunctively)

2. **POWER OF SALE MUST BE EXERCISABLE (Query: When does power of Sale becomes exercisable? The following conditions must be satisfied)**

i. A demand notice must be served on the mortgagor (at least 3 months after service of notice) and he is in default of payment
ii. The mortgagor is in default of payment of the Interest or instalment in arrears due and payable for a period of (at least two consecutive months)
iii. The mortgagor is in breach of any provision in the mortgage deed apart from the covenant to repay principal sum and interest.

Any One Of The Above Condition Is Sufficient, Not Cumulative. NOTE: power arising is not same as power becoming exercisable.

Mode of sale: usually by public auction.

1. The mortgagee in exercise of power of sale is not an agent of the mortgagor and he is not bound to take into cognizance the interest of mortgagor.
2. He only acted for his interest.
3. He only need to show that he has acted in good faith.
4. Must not sell at gross under-value. (bad faith will be imputed)
5. Reasonable undervalue is permitted see. EKA-ETEH V NHDS LTD (1973) ALL NLR 555
6. The mortgagee should not sell to himself or any of his agent and cronies.

Query: sale after power have arisen but before exercisable? If made to a valuable purchaser for value without notice (though make enquiries that the power had arisen), it will be valid. The mortgagor can only sue the mortgagee for damages. Where the innocent purchaser doesn't make necessary inquiries on whether the power had arisen or is of the knowledge that the power had arisen and not yet exercisable, the sale will be set aside (not valid).

Also where the mortgagor has the power to have arisen and the power has not become exercisable the sale will be set aside. But if the buyer is a bonafide purchaser his interest must be protected. And in the end the mortgagor will be compensated in damages.

Position/protection of bona fide purchaser for value without notice. S. 21(2) CA, s 126(1) PC

Note effect of sale: it extinguishes the equity of redemption. And equitable right to redeem see Section 111 and 112 PCL, mortgagee may incur liability for improper exercise of power of sale see Section 126 PCL and Section 21 CA.

In addition to the above two conditions:

a. The mortgagee must act bonafide (in f good faith)
b. The mortgagee must not sell the property as gross undervalue (negligible price)
c. The mortgagee must ensure he does not sell the property to itself, its servants, agents or privies
d. The mortgagee must not conclude with the buyer

1. Note that the bank is not an agent or a trustee of the mortgagor before the sale or during the sale of mortgage property.
2. The bank has no obligation to carry the mortgagor along either before or during sale
3. The bank need not sell suggested or proposed price
4. The bank need not sell at the market price

APPLICATION/UTILIZATION OF PROCEEDS OF SALE

a. Settle prior encumbrances (i.e. mortgages having priority) Section 21(3) CA and s 127 PCL: Note the order.
b. Settle the cost, charges and expenses incurred in the sale.
c. Settle the mortgage sum and interest
d. Left over/ balance is paid to the mortgagor **SEE SECTION 39 OF MPL,**

WHEN SALE MAY BE RESTRAINED OR SET ASIDE:

b. Mortgagor has no good title ab initio see ALLI v IKUSEBIALA
c. Where requisite consent was not obtained
d. Non- registration of mortgage (where property is in Registration of Title Law district)

Note that the all the rights of the legal mortgagee hare not mutually exclusive.

Note the position where the proceeds sale are not sufficient to liquidate mortgage sum and interest see VISIONI V NATIONAL BANK

FORECLOSURE

Available to all mortgages. Other way in which the equity of redemption is extinguished. Order of court extinguishing the equity of redemption. Can only be brought pursuant to an order of the court (only exercisable upon grant by the court)

NOTE THE TYPES OF ORDERS THAT CAN BE GRANTED

❖ Nissi (the mortgagor has six months within which he is to redeem the mortgage property)

Absolute (after 6 months)

❖ It must be brought before the expiration of 12 years (limitation of time is 12 years)
❖ It can be re-opened whether *nissi* or absolute (special circumstances)

SPECIAL CIRCUMSTANCES

Circumstances that may justify an application to re-open a foreclosure order absolute.

Where the mortgagee after obtaining foreclosure order absolute brought an action for principal sum and interest. The mortgagor applies to the court without delay after the foreclosure order has been issued explaining that the his default to pay was owing to circumstances beyond his control and is willing to pay and ready to tender the money:.

- Where the value of the property far exceeds is higher than the amount outstanding or mortgage sum
- Where the property or the security is of special value to the mortgagor
- Where it is just and equitable to do so.
- Where the mortgagee acted in bad faith (he didn't comply with the conditions for exercise of power) bring an application to re-open order redeem. Satisfying the following conditions:
  ---- must not be guilty of delay or application must be brought timeously
  ---- must not be guilty of any unconscionable conduct
  ---- must show to the court why the money has not been paid
  ----- must have the money at present or ready.

EFFECT OF FORECLOSURE ORDER ABSOLUTE

e. LEGAL MORTGAGE: vets the ownership of the property In the mortgagee absolutely subject to any legal mortgage having priority
f. EQUITABLE MORTGAGE- the mortgagor is compelled to convey the property to the mortgagee but upon sale of the property the mortgagee must account (to the mortgagor) for the proceeds of sale

REASONABLE ORDER OF EXERCISING THE REMEDIES

- ❖ Suing for principal and interest
- ❖ Receiver
- ❖ Sale
- ❖ Foreclosure… CODE: SRSF

EQUITABLE MORTGAGEE

a. Right of action in court
b. Foreclosure
c. Specific performance
d. Appointment of a receiver- by order of court
e. May have a right of sale where certain conditions are satisfied:
-- That the mortgage is created by deed,
-- The parties insert any of the remedial devises (Power Of Attorney and Trust Declaration)
--- There must be no contrary intention
** Action for principal and interest *** Sale: depends on mode of creation (by deed and remedial clauses)
See also order 51 Lagos State high court (civil procedure) rules 2012

DISCHARGE OF MORTGAGE

The mode of discharge depends on the mode of creation:

1. By assignment (CA)/sub-demise (ALL JURISDICTION)/ demise (MPL): discharged by (deed of re-conveyance/ release/discharge) Re Moore & Hulm's Contract
2. Created by charge by deed expressed by way of legal mortgage/statutory mortagage. Discharged by mere payment (statutory receipt= name of the payer and executed by the chargee). A simple receipt for Equitable mortgage
3. Where corporate entity is the mortgagor: file in addition to the deed of release, file a memorandum of satisfaction pursuant to 204 CAMA at the CAC i.e. form CAC 8.
4. Where the mortgagor fail to file the deed of release at the land registry, the encumbrances will still remain on the property. It is the mortgagor responsibility to file the deed of discharge.
5. Discharge of Equitable Mortgage : By simple receipt
6. Discharge by payment into court See Section 5 CA, Section 75 PCL
7. Discharge of mortgages in Lagos State ….See Section 41 MPL, but then Section 55 Land Registration Law Of Lagos State

NOTE: in Lagos State under LRL, the mortgagor cannot create a lease without the consent of the, mortgagee. See section 49 LRL.

WEEK 13

MORTGAGES PART 3

The formal parts of a deed are:

a. Introductory part
b. Operative part
c. Miscellaneous
d. Concluding part

Generally all deeds of legal mortgage have recitals.

FORM AND CONTENT OF A DEED OF LEGAL MORTGAGE

INTRODUCTORY PART:

1. COMMENCEMENT

THIS LEGAL MORTGAGE/ THIS DEED OF LEGAL MORTGAGE/ THIS CHARGE BY DEED EXPRESSED TO BE BY WAY OF LEGAL MORTGAGE/ THIS CHARGE…

2. **DATE:** same as in Deed of Assignment
……is made this…….day of ……..2016

3. PARTIES

- Mortgage/ Mortgagee
- Borrower/lender
- Surety- when applicable
- Of the first part
- Of the second part
- Of the third party

4. **RECITAL**: Recital is necessary….

- Use both introductory and narrative recitals
- Begins with WHEREAS
- Recite the mortgagor's title
- Recite the loan agreement
- Fact on obtaining consent
- Other information introducing the present transaction

5. **OPERATIVE PART**

- It commences with receipt clause:
- TESTATUM – usually contains two testatums: Covenant to repay principal sum and covenant to pay the interest: TESTATUM 1
- Conveying as beneficial owner (charge of Security): TESTATUM 2

NB: the two important matters to be included in the operative part of a deed of legal mortgage

- First testatum borrower covenants to repay the principal and interest on an agreed date
- Second testatum borrower states his capacity and charge the property (Conveys)

NOTE THE IMPLICATION OF CONVEYING AS A BENEFICIAL OWNER

- All the six covenants plus one:

a. Quiet possession/enjoyment

b. Further assurances
c. Right to convey
d. Freedom from encumbrances
e. As a lessee: All the provisions/covenant of the lease has been complied with
f. The lease is valid and subsisting
g. That the Mortgagor covenants to observe and perform conditions in the lease and to indemnify the mortgagee in case of breach that may arise on want of title

DRAFTING THE OPERATIVE PART

NOW THIS DEED made in pursuant of the agreement and in consideration of the sum of…….paid to the borrower by the lender (the receipt of which the borrower acknowledges)

Now this deed witnesses as follows;

1. The borrower covenants to pay the lender….
2. The borrower as beneficial owner charges/assign/ sublease to the lender ALL THAT property located at ……..

COVENANTS IN A MORTGAGE

1. **Covenant to pay the principal sum**: ordinarily the parties should agree to the date of payment.
2. **Covenant to pay interests**: where interest rate has not been stipulated the court would impose reasonable interest rate. Where the rate agreed or stipulated is unconscionable the court can reduce. An amount can be stipulated or reducible upon prompt payment. E. g. "interest shall 18% but if paid by the 15th of every month it shall be 9%. (Inducement). As oppose to punishment or fine. Upon default to pay promptly.

   Take note when drafting of incentive of prompt payment to come after the main interest not vice versa

3. **Covenant to insure**: the property is important to the mortgagee. Where the mortgagee does not include an insurance covenant, upon destruction of the property, the mortgagor cannot compel the mortgagee to repair.
4. **Covenant to repair**: the property may depreciate. This covenant is usually that of the mortgagor. Where the mortgagee carries out a repair he later imposes it on the mortgagor. to preserve the value of the property
5. **Covenant as to declaration of trust and Power Of Attorney:** the remedial devices ante. Used in sub-demise under a Conveyance Act, Jurisdiction.
6. **Covenant to pay rent and observe covenant in head lease**: this is an express provision as to one of the implied covenant. Subject it to the consent of the mortgagee.
7. Covenant not to lease or sublet
8. Collateral advantage- nothing to clog equity of redemption, the test is whether the clause is unconscionable or clog See CITY LAND PROPERTY (HOLDINGS) LTD v DABRAH (1968) Ch 166.
9. Charging Clause:
10. Right of mortgagee: Retention of title deeds
11. Re-conveyance/ cesser : covenant to reconvey: do not put any clog

CONSOLIDATION OF MORTGAGES

Generally consolidation of mortgages is not permitted under the law. See section 17 CA and 115 PCL: the laws go against it. This right to consolidate is given to the mortgagor. Three or four properties mortgaged to one/single mortgagee. "It is all or none" the right of the mortgagor is restricted as to the redeemability of the property in regards to a particular property of the mortgage.

The covenant to restrict the right to consolidation. The sections should be excluded in the mortgage deed while drafting.

He who comes to equity must do equity

The elements of this covenant are:

a. same mortgagee,

b. same mortgagor,
c. right to consolidation must exist in the mortgage,
d. right to redeem must have passed in respect of all the properties,
e. The legal due date must have passed for all the properties.

CONDITIONS: Different properties and mortgages, Same mortgagor and mortgagee, All the mortgages must be discharged before redemption of the properties

CONCLUDING PART

TESTIMONIUM

IN WITNESS OF WHICH THE PARTIES HAVE EXECUTED THIS DEED IN THE MANNER BELOW THE DAY AND YEAR FIRST ABOVE WRITTEN

EXECUTION

ATTESTATION

PERFECTION: Consent, stamping, registration at CAC, registration at Lagos state Mortgage Board.

ETHICAL ISSUES

1. Not to aid in reduction of stamp duties

2. Conflict of interest

3. Client's account

WEEK 13

BILLING AND CHARGES IN PROPERTY LAW PRACTICE

BILLING ACCOUNT AND RECOVERY OF LEGAL/PROFESSIONAL FEES

What is a professional legal fee? Money the lawyer collects for the work done for the client.

Note the provision of rule 51 of RPC, 2007, charges are based on the nature of work to be done:

Generally the professional fee charged by a lawyer for his services shall be reasonable

MODES OF CHARGING

Time charging (hourly)

Gearing: deposit

Quantum meruit basis

Appearance

Contingent

Retainer ship: general and special

TYPES

1. **Consultation/Briefing Fees**: monies paid by client on the first day of meeting with the lawyer at the initial client interview stage. Not the fee for the work to be done. If lawyer proceeds, the client have to perfect the brief.

2. **Scale Fee**: Legal Practitioners' (Remuneration for Legal Documentation and other Land Matters) Order, 1991. It provides for scales to guide lawyers in calculating their fees in certain transactions. Not applicable to litigation and perfection of document

3. **Fixed Fe**e: fee agreed between the lawyer and client for execution of professional service.

4. **Hourly Fee:** charge per hour spent on the service rendered to the client.

5. Percentage Fee: common in property transaction and some civil cases of liquidated money demand. Charge on the value of the transaction being done. E.g 10% is common in property transactions.

6. **Appearance Fee**: it depends on the location and the case and the court to visit can be cumulated or paid periodically, has been upheld by the court. See OKONEDO-EGBAREGBEMI V JULIUS BERGER. It is outside the professional fees to be charged. Amount differs or varies from lawyer to lawyer depending on the standing or status of the lawyer. Usually charged in litigation service.

7. **Contingent Fee**: charged based on the outcome, success or level of success of the legal work. It is not like other fees that be charged based on the lawyers discretion. Not applicable in criminal matter. Rule 50(1) RPC. Conditions (test is objective, reasonable man mind)

a. Reasonableness of the agreement. Must be fair, balance and objective
b. Not vitiated by mistake, fraud and undue influence
c. Not contrary to public policy
d. If it involves litigation, there must be an obvious bona fide cause of action
e. Not applicable in criminal case sub rule(2)
f. Don't acquire interest in subject matter of the property but have right of lien by the solicitor. (3)
g. No contingency arrangement until advice on the pros and cons of the case and other facts that may be at the client interest in the property. (4). Duty of honest and candid advice

General retainer or special retainer: general retainer is allowed to all things necessary and incidental to the power of representation or solicitor ship anything related to law or legal services. In special retainer is only allowed to do a particular work.

The fact that there exists a special retainer ship does not mean you cannot appear against such client in a matter not related to the subject matter of the special retainer ship with the client.

NOTE: the fact that you have been retained does not mean you should not charge for work done.

NOTE: Never give quotation and don't agree to a salary structure

FACTORS TO BE CONSIDERED IN CHARGING FEES

1. Complexity or difficult of the work
2. Novelty of the service
3. Number, length or importance of the document prepared or perused
4. Time expended/required
5. Place/circumstances of the work
6. Value of the transaction
7. Importance attached to the matter by the client

See FOY YAMEH & CO SOLICITORS V DASCOLI (NIG) LTD (2011) ALL FWLR (PT 572) 1814 at 1827

8. Status of the client
9. Other jobs lost or that may be lost because of the matter
10. The controversial nature of the matter

RECOVERY OF PROFESSIONAL FEES

SUE FOR FEES: CONDITIONS PRECEDENT SECTION 16 (2) LPA:

a. Signed bill of charges containing particulars of principal items must be presented
b. One month must expire
See
1. ABUBAKAR V MANULU (1998),
2. OKENLA V BAKARE (1968) 5 NSCC 245
3. OCEAN STEAMSHIP LTD V SOTIMINU
4. OYO V MERCANTILE BANK OF NIGERIA
5. FBN V NDOMA- EGBA
6. OYEKANMI V NEPA

PROCEDURE

1. The lawyer must prepare and sign the Bill of charges
2. Deliver and serve the bill of charges on the client
3. Wait for a period of month. See IFEKWE V MADU (2000) 4 NWLR PT 688 at 459
4. If client refuses to pay, apply to High court for recovery of the fee

MEANS OF APPLICATION

1. Apply by writ of summon
2. At the state High court where the client or the lawyer carry on business
3. Non-compliance renders the case incurably bad
4. Where the sum is liquidated, Order 11 of Lagos or undefended list in Abuja may be invoked.
5. Where it is contentious, it has to be by writ of summon Rule 52(2) RPC and Scale III.
6. Bills Of Charges should be in duplicate

Note the procedure is not exhaustive nor exclusive

EXCEPTION TO THE ONE MONTH RULE

The period of one clear month is mandatory and cannot be abridged except by order of court upon satisfaction of the following conditions:

a. Obtaining the leave of court for abridgment
b. He has served a valid Bill of charges containing all the necessary particulars on the client
c. Bill of charge appear proper or reasonable in the circumstance. Not objectionable
d. Client is about to do act with a view to delaying or preventing payment of the fee.

NB: An Order for abridgment will not be granted upon satisfaction of the condition if the client has given security for payment of the professional price.

OTHER METHOD

1. Lien on the client property. See also 29(3)(b)(iii) RPC- lien on document of the client in respect of unpaid fee
2. Lawyer may adopt ADR. See 52(2) RPC

DISADVANTAGES OF EARLY RESORT TO COURT

1. Strains relationship with client
2. Discourages potential client
3. It is time consuming
4. It drains resources
5. It is embarrassing

BILLS OF CHARGES

A document in form of a letter delivered to the client by the lawyer in a particular format communicating the particulars of services rendered and the charges thereto asking the client to pay.

No universally agreed specimen, it may take any form provided the content are intact

CONTENT OF A BILL OF CHARGES: see OYEKANMI V NEPA

1. Must be in writing
2. Should contain all charges
3. Principal items
4. Particulars of principal item—work done, costs, expenses, disbursements etc.
5. Must be dated
6. Must be signed personally by the Legal Practitioner
7. Must include the name of the client
8. Must be sent to the client's known address

In OYEKANMI v NEPA, if the mandatory items are not contained, it vitiate action for recovery of fees and render the bill of charges void. Usually in the Legal Practitioner letter head or accompanied with a covering letter.

TAXATION FOR BILLS OF CHARGES. See 48(2) RPC, note also section 17 and section 19 LPA

It is not connected to Personable Tax Act or Capital Income Tax Act

It simply means review of professional fees. It involves appointing a court official to determine the fairness and reasonableness of the fee charged by the Legal Practitioner. It need not be for contentious matters. It comes into play when the Legal Practitioner and Client are not ad idem on the professional fees to be paid. i.e the sum is not liquidated. Arguing the excessiveness of the fee.

Determining an excessive fees: things to consider- Whether the fee charged matched with the service rendered or it does not commensurate. The person appointed to review the fee is called Taxing Officer. He is usually a court official or persons appointed by the judge (High Court Judge).

Who Can Apply For Taxation? Or Can the Court Review Suo Muto, The Court Cannot review suo motu, parties must come to court, see the case of SOBODU V DENLOYE

SECTION 17 LPA

Options open to client on receipt of Bill of charges

1. Client may pay
2. He may choose not to pay and await court action
3. He may dispute the bill
4. He may apply to court for taxation:
5. Client can apply within one month from the date of the receipt of the bill of charges

a. the court must order taxation
b. May additionally order that until the taxation is completed, no action for recovery of professional fees may be brought.

❖ Court may order after the expiration of one month period on application by LP or the client???

Options open to lawyer after expiration of the period of one time, the lawyer has the following options:

a. Apply for recovery of the professional fee
b. Initiate ADR options with the client
c. Apply for taxation. See 17(2) LPA, especially where the client is disputing the amount of the Bill.
d. Court may give additional order for stay or suspension of recovery action

NB: with respect to time, after the expiration of the one month period, the court is at discretion to order for taxation.

1. After expiration one month;

a. The right to apply terminates upon the happening of any of the following:
- After the expiration of the period of twelve month from the day the Bill was paid
- On expiration of period of twelve month form the date of service of the Bill of charges
- After judgment has been delivered in action for recovery of professional fees. Note that in the last two, the court may decide to order otherwise if it thinks fit.

NB: the report of the taxing officer appointed by the court is final and cannot be reviewed by the court.

CALCULATION OF PROFESSIONAL CHARGES/FEES

1. LEGAL PRACTITIONER (REMUNERATION OF LEGAL DOCUMENTATION AND OTHER LAND MATTERS) ORDER, 1991
2. JUDICIAL PRECEDENT.

LEGAL PRACTITIONER (REMUNERATION OF LEGAL DOCUMENTATION AND OTHER LAND MATTERS) ORDER, 1991

It deals with remuneration in respect of sale, purchase, mortgage, lease and other dealings in land.

It is divided into three scales:

SCALE 1: sales, purchases and mortgages

SCALE 2: leases and agreements for lease at rack rent

SCALE 3: BUSINESSES THAT ARE NOT CONTENTIOUS (not litigation,)

Under the LP (RDLM) O there are three scales:

The order regulate solicitors fee for legal documentation and other land matters with particular reference to leases, sale of land and Mortgages and other legal documentations and land matters falling outside this.

Note that, the scales do not apply to the following:

a. Regulated transactions or business (laws regulating charges in some transactions)
b. Not applicable to litigation services

1. Scale I deals with Purchase, sale and Mortgages, investigation of title, negotiation and deducing title and other related matters

r2. Scale II regulate leases with special reference to rack rent.

NB: charges under scales I and II cannot be varied by any of the parties

Calculation under the scales is not exclusive but when opted for must be strictly complied. See FOY YAMEH & Co SOLICITORS V DASCOLI (NIG) LTD (2011)ALL FWLR PT 570 at 1814

3. Scale III provide for all other legal documentation other than those provided for in scales I and II. If Scale III is opted, the charge must be fair and reasonable. All factors for charging apply specifically to scale III and all other matters.

RULES GOVERNING CALCULATION OF PROFESSIONAL FEES

NB: state rules before calculating the transaction.

Rules

MORTGAGES

1. Where the legal practitioner act for only the Mortgagor or Mortgagee, he is entitled to charge his full fees
2. Where the Solicitor act for both the Mortgagor and Mortgagee, he will charge full of the Mortgagee Solicitor's fees and Half of the Mortgagor Solicitor's fees
3. Where a Solicitor acts for a third party in Mortgage (Surety/Guarantor), he charge under Scale III

LEASES

1. Where he acts for only the lessor or lessee, he charges full fees for his client
2. Where one lawyer is acting for both the lessor and lessee, he will charge full fees from the lessor's solicitor's fee and half of the lessee's solicitor's lawyer.

SALE AND PURCHASE OF LAND

1. When acting for only the Vendor or purchaser, charge full fees
2. When acting for both parties, charge full fees from both parties

CALCULATION OF PROFESSIONAL FEES

MORTGAGES

There are five steps to follow when acting for only one parties but when acting for both parties, there are 11 steps

1. Step one: for the first N1000 per 100: 1000/100 X scale figure/ 1

2. Step two: For the second and third 1000 per 100: 2000/100 X scale figure/1

3. Step three: for the fourth and each subsequent 1000 up to 20000: 17000/100 X scale figure/1

4. Step Four: For the remainder without limits: Remainder/100 X scale figure/1

5. Step Five: Add the outcomes or results in step one to four. Result is the full fees for the LP for acting for only one parties in a mortgage or sale of land

CLASS EXERCISE

Mrs Grace Eke is solicitor to Change Nigerian Bank Plc in a Loan/Mortgage transaction with Onowu Dele. Mr Dele is the Mortgagor while Change Nig Plc is the Mortgagee. The Mortgage sum is N 1000000. Calculate Grace Eke's for negotiating the loan on behalf of the bank.

SOLUTION

The rue governing the fees is that Grace Eke will be entitled to charge full amount of the Mortgagee's fees having acted for only the Mortgagee.

Step 1= 1000/100 X 1 /1 =

Colum 7 of SCALE I will be used. The amount results to N50, 986.

LESSEE

NB: at all times and in every circumstances, the Lessor's fee must be calculated to determine the lessee's solicitor's fee

The formula is as follows:

1. Step one: where the rent is not above 100, the charge is fixed at all time. The lawyer charge on N37.50

2. Step two: If the rent is above N100 but does not exceed N1000. Calculate rent for the first N100 which is 37.50. Calculate remaining amount= remainder/100 X 25/1

3. Step three: if it is above N1000, there are 4 steps involved:

a. For the first N100= 37.50
b. From second hundred to N1000= 900/100 X 25/1
c. For the remainder without limit: remainder/100 X 12.50/1

4. To determine the Lessor's solicitor's fee, add steps one to three

ETHICAL ISSUES

1. The lawyer must charge adequate fees. 48(1) RPC
2. The lawyer must not charge illegal or excessive fees 48(2) &(3) RPC
3. In charging professional fees, the lawyer must be fair and reasonable at all times. 50 RPC
4. Even in charging and recovering of professional fees and Billings, he must keep to all his fiduciary duties to the client
5. The lawyer must be very diligent and meticulous in preparing his bill of charges. See 16 RPC and FOY YAMEH
6. Must honour all agreements with the client in respect to professional fees
7. Advised that agreements in respect to professional fees are reduced to writing to crystallise the position of the parties. The fact that the agreement is not in writing should not be a reason for the lawyer to avoid performance
8. Lawyer must not employ sharp practices in recovery of professional fees. See Rules 1 and 15 RPC
9. He must not take the law into his hand or self help for recovery of fees
10. Must not misrepresent or mis-state facts with a view to misleading the court during recovery of professional fees.

WEEK 14

WILLS AND CODICIL PART I

MEANING OF WILL

A WILL is a testamentary document/instrument voluntarily made by a person with a sound disposing mind and executed according to law, by which he distributes/disposes his estate and gives other instructions/directives to be carried out after his death. OKELOLA V BOYLE (1998)

NATURE OF A WILL

A will being a mere declaration of intention in a person's life time which has no effect until his death. Therefore it is testamentary in nature and it is revocable during his lifetime; it could be changed as often as the testator wishes that is why it is ambulatory in nature. It is a creation of the statute and it is necessary that it is governed by the provisions of the relevant statute.

FEATURES OF A WILL

a. Will under the statute must be an instrument—must be in writing and signed.
b. It is testamentary in nature: comes into effect on the death of the testator
c. It is ambulatory: amendable and revocable during the life time of the testator.
d. It must be made voluntarily: testator is aware and approved of all the content of the document.
e. Must be executed according to law.
f. A will describes adequately the properties in the estate and the beneficiaries of the gift in the estate.
g. Contains instructions on how his estate is to be disposed of after his death.
h. May contain other instructions to be carried out after his death.
i. The maker must possess a sound disposing mind (*corpus mentis*)

CODICIL

It is a miniature will, like an addendum to a will. It is of similar nature as a will as regards both its purposes and formalities, but in general it is supplemental, and considered annex to a Will previously made, being executed for the purpose of adding to, revoking or varying the provisions of that Will ---- simpliciter it is annexed to a will. See **page 203 para 301 Vol 50, 4th Edition, Halsbury`s Laws of England**

WILL	CODICIL
Can stand on its own	Must refer to a will, cannot stand or exist without a will.
It contains the dispositions of the testator.	Used to amend, subtract, revoke, confirm, and refurbish a will.
	Many codicils can be made to one will

Does a will transfer interest in land. No, it is the assent that transfers the interest in the property not the will.

DEFINITION OF TERMS:

a. **Testator**: a man who bequeaths his estate in a will
b. **Testatrix**: a woman who bequeaths her estate in a will.
c. **Estate of the deceased:** bounty or properties of the deceased whether realty or personalty, movable or immovable.
d. **Testate**: the deceased dies after making a will.
e. **Intestate**; the deceased dies without a will or partially when the will did not cover every property of the deceased.
f. **Beneficiary:** this is a person entitled to the property in the will or a particular benefit in the will. He can also be called a successor sometimes.
g. **Personal representatives:** they include the executors and administrators of the estate of the deceased. When they are appointed in the will they are called executors but if they are not appointed in the Will they are called administrators.

APPLICABLE LAWS

1. Will Act, 1837—1837—not applicable to Lagos

2. Will Act (Amendment) Act, 1852---amend 1837 Act
3. Wills Laws of the various State in Nigeria
4. High Court Civil procedure Rules of the Various States
5. Common Law & Principles of Equity
6. Islamic law
7. Native Law & Custom (Customary Law)
8. Armed Forces Act
9. Case Law (Judicial Precedents)
10. Land Use Act
11. The Evidence Act

JURISDICTIONS OF WILL

- Jurisdictions under the Will Act
- Wills Law Jurisdiction—in Lagos

TAKING INSTRUCTIONS AS TO THE WILL

A. Instructions should be taken in writing by the solicitor
B. The solicitor is to guide the testator as he makes the will
C. Issues of ambiguities should be clarified.
D. The lawyer must keep his language simple, devoid of complications.

WHO CAN DRAFT A WILL: Anybody can draft a will but it must meet up with the legal requirements for it to be enforceable.

WHY PEOPLE ARE AFRAID TO MAKE WILL

- Belief that will is a sound reminder of death
- Belief that will may cause, chaos, acrimony, ill-feelings, disunity among heirs/beneficiaries
- The disbelief in the Nigerian legal system in general.
- The clash between culture, religion, beliefs, customs and wills

ADVANTAGES OF MAKING A WILL

1. It displaces the application of customary law rules on intestacy- See the case of **Sogbesan v Adebiyi (1941) and Idehen v Idehen**
2. The testator has the satisfaction or peace of mind of having ordered his affairs before his death. (a sense of fulfilment)
3. Displaces the application of statutory rules of devolution, such as ADMINISTRATION OF ESTATE LAW OF A STATE, etc.—COLE V COLE
4. Affords testator an opportunity to benefit loved ones, or children owed the duty of care…see the case of Maja v Johnson (1951)
5. Opportunity to choose trusted executors.
6. Where he has infant children, he is able to appoint for them a guardian.
7. It gives the testator the opportunity of making specialty gifts. E.g. organ donation.
8. Powers of executors arise immediately upon death of testator- OJUKWU V KAINE (1997)
9. There is continuity in administration of an estate covered by will.

DISADVANTAGES OF MAKING A WILL

1. Additional costs are borne by the maker because solicitors are appointed to draft the will compared to oral directives of nuncupative or customary wills.
2. Making a will is an individual thing it does not encourage community or affinity or the concept of "common estate for all" because the testator does not leave or give the property to the discretion of the community.
3. Any vitiating element can easily make the will invalid as opposed to customary will that does not follow the strict formalities of the law.

TYPES OF WILL

1. **NUNCUPATIVE WILL**: this is an oral directive of a person in anticipation of death in respect to the disposition of his property upon his death. This is known to customary law. It is meant to take effect upon death of the testator.

But is not valid unless —

a. It has to be made in the presence of at least two credible witnesses
b. The will must have been made voluntarily;
c. The property and beneficiaries must be specifically and adequately described so as to make the property ascertainable and identifiable. (AYINKE V IBIDUNNI).

2. **STATUTORY WILLS**- they are wills made according to Wills Act/ Law 1837 or the relevant wills law of the testator's state.

FEATURES:

a. It must be in writing. Any form of language will suffice. It can be holographic in nature (handwritten) or typed see section 9 Wills Act 1837
b. It must be duly executed;
c. It must be attested to by at least two witnesses
d. The testator must have testamentary capacity
e. It must be made in accordance with the provisions of the Wills Act

There are EXCEPTIONS as follows:

EXECUTION (SIGNING) OF A WILL

- For a document to be valid a s a will it must be executed section 9 of the Wills Act

a. The testator's signature may be made in any way provided there is an intention to execute his will. It may be thumbprint, initials, stamped, name, and mark. Etc.
b. A will does not need to be sealed. A will sealed and not signed is not valid.

WHERE A WILL REFERS TO A DOCUMENT IN A WILL

A document referred to as a disposition in a will but not executed will be incorporated as part of the will. The following conditions must be met for the disposition to be valid:

a. The document must be in existence when the will was executed.
b. The will must clearly identify the document
c. The will must refer to the document as already in existence.

MODES OF EXECUTION OF A WILL

1. It must be executed in accordance in line with the provisions of section 9 Wills ACT

a. SIGNED PERSONALLY ON THE CONDITIONS: PERSONAL EXECUTION BY THE TESTATOR:

i. It must be done in the presence of at least two witness
ii. The two witnesses must be present at the same time of signing by the testator
iii. Each of the witnesses must sign the will in the presence of the testator
iv. Each of the witnesses need not sign in the presence of each other. (Need not witness each other's attestation)

b. SIGNED THROUGH A REPRESENTATIVE/ A DELEGATE: TESTATOR APPOINTS SOMEONE TO EXECUTE ON HIS BEHALF

ii. Must be done in the presence of at least three/four people
iii. It must be done pursuant to testator's instruction
iv. All the three people must be present at the time of signing by the representative
v. Each of the witnesses must sign the will in the present of the testator

vi. Each of the witnesses need not sign in the presence of each other.

a. TESTATOR PRE-SIGNED THE WILL BEFORE THE WITNESS

j. He must acknowledge his signature in the presence of at least two witness
k. The two witnesses must be present at the time of signing/acknowledgement
l. Each of the witnesses must signed the will in the present of the testator
m. Each of the witnesses need not sign in the presence of each other. **See OWUDINJO V OWUDINJO**

3. PRIVILEGED WILL

Compliance with the strict formality of writing, capacity, execution and attestation of a will is disregarded in the case of the following persons:

1. Soldiers in actual military service
2. Mariner or Seamen at sea
3. A crew of commercial airline, Aircrew on air of commercial air craft—

See section 276 of the Armed Forces Act, cap A14, LFN, 2004; section 6 Wills Laws, Cap W2, Law of Lagos State; section 11 Wills Act and section 193, Air Force Act.

- Note that it is only effective with respect to money and/or personal property.
- A privileged will is a departure from the essentials of a valid will if it is attested to by just one officer.
- It is exempted from the provisions of sections 9 of the Wills Act 1837

ESSENTIALS FOR ITS VALIDITY

a. It can be in writing …
b. It must be signed by the testator
c. It must be witnessed by one witness
d. The testator must have a testamentary capacity and the intention to make the will.
e. It deals with only personal properties i.e. money and personal property.

POSITON OF SIGNATURE

- Signature may be anywhere in the Will --- see section 1, Wills Act (Amendment) Act, 1852; section 4 (1), Wills Law, Lagos; and IN THE GOODS OF OSBORNE

- **Note the effect of gift or instruction coming after the signature --- they are invalid, even though the Will is still valid --- IN THE GOODS OF WARDEN**

WHO CAN MAKE A WILL-

1. Every adult with sound disposing mind can make a will. This (see **Apatira v. Akande (1944),** including old people, sick people, blind, Muslim or Christian;
2. Infants (persons under 21 years of age) generally cannot make a will – section **24, Wills Act, 1837.**
   But in Lagos, it is 18 years --- **S. 3, Wills Law, Lagos**

EXCEPTIONS TO TESTAMENTARY CAPACITY

- Privileged Wills – see s. 11, Wills Act, 1837 & s. 6, Wills Law, Lagos.

- Note special requirements for blind persons—Jurat.

OTHER ELEMENTS OF TESTAMENTARY CAPACITY

- Testator must have mental capacity (sound disposing mind) ----

– at the time of issuing instructions and

– At the time of executing the Will.

See **Okelola v. Boyle**

PRESUMPTION OF MENTAL CAPACITY

- ***Omnia praesumuntur rite*** *et solemniter* ***esse acta*** **(**Presumption of regularity) --- see **Egharevba V Oruonghae**; **In Re Randle**,
- This is rebuttable: **Croft V Croft**; **Noding V Alliston** .
- Doubts are resolved in favour of the will. **In the estate of Randle**.
- But see **Cartwright v. Cartwright ---** presumption as to serious mental illness
- Soundness of mind must be distinguished from state of bodily health (**FAG v. Johnson (1960) LLR 292)**
- Now see **Banks v Good fellow** for test of mental capacity

TEST OF MENTAL CAPACITY WAS LAID DOWN IN BANKS V. GOOD FELLOW AS FOLLOWS –

(1) **Testator must understand the nature of his act;**

(2) Must understand the extent of the property he is disposing of

(3) Must understand the claims on him

(4) The manner in which the property is distributed must be rational

NOTE THAT WHERE ---

- ❖ Testator gave instructions **DIRECTLY** to his **SOLICITOR** at a time he (testator) was mentally capable, &
- ❖ The solicitor comply strictly with the instructions, then it does not matter if the testator subsequently loses his mental capacity, provided he understands at the time of execution that he was executing his Will for which he has earlier given instructions ----- see **PARKER v FELGATE (1883)**
- This situation must be distinguished from the facts of **SINGH v. ARMICHAND** (1948) 1 All Er 152

MENTAL CAPACITY AT THE TIME OF GIVING INSTRUCTIONS BUT NO MENTAL CAPACITY AT THE TIME OF EXECUTION.

1. Will may valid and admitted to probate on the conditions that:
   i. The testator gave the instruction to a solicitor (LP)
   ii. The instruction must be given direct to the lawyer not through an intermediary
   iii. The instruction must be given at the time the testator was mentally capable
   iv. The lawyer must have complied strictly with the instructions
   v. There must be evidence that even though the testator has lost mental capacity at the time of executions, nonetheless he understood the nature of his act.

PRECAUTIONARY MEASURES TO ESTABLISH MENTAL CAPACITY

1. A LP should be made to confirm in writing the testamentary capacity of the testator at the time of making and execution— RE WALKER (1912)
2. Take medical evidence where necessary and attached to the will
3. Have a video recording made by man having sound mind for disposition of the testator

VALIDITY OF A WILL

a. For a will to be valid it must be duly executed and attested

b. Nonetheless any disposition after the signature either in time or in space will not be effective either as a valid disposition.

c. A will is properly signed by the testator subscribing his name or affixing his thumb. In the estate of Finn and Adebajo's case.

PROOF OF VALIDITY OF A WILL

1. Testator must have mental capacity
2. Must have be of the age required by law
3. Must have acted voluntarily
4. Must be in writing
5. Must satisfy all the requirement of the law on execution
6. No restrictions on testamentary capacity

ALTERATION IN A WILL; 21 WILLS ACT

1. The alteration must be counter signed in line with s. 9 Wills Act otherwise the alteration have no effect
2. Where part altered is not apparent to the ordinary eyes the part is deemed revoked.

PROOF VALIDITY OF A WILL

- Presumption of regularity
- Proof of due execution
- Presumption of Sound mind
- Positive affirmative evidence

POSITIVE AFFIRMATIVE EVIDENCE

- Evidence that testator made the will himself ;
- Evidence of attesting witnesses, with corroboration – ADEBAJO v. ADEBAJO
- Evidence of testator`s conduct before and after making the Will
- Evidence of general habit and course of life of the testator – ADEBAJO v. ADEBAJO
- Medical Evidence --- BOUGHTON v. KNIGHT; OKELOLA v, BOYLE

BENEFICIARY/ HIS HER SPOUSES WITNESSING A WILL

- Effect is that the beneficiary loses the gift (**Ross v. Counters; Re Pooley),** and Solicitor that prepared the Will without advising the testator on the attestation may be liable for negligence (**Ross v. Counters)**
- **Note the Exceptions**

EXCEPTIONS TO BENEFICIARY OF A WILL

1. Gift made in settlement of debt/obligation – s 15, Wills Act; s 8. Wills Law, Lagos
2. Beneficiary married witness after execution – **APLIN v. STONE**
3. Witness is only a trustee of the gifts but with at least two other signatories as witnesses– **CRESWELL v CRESWELL**
4. **Gift** is subsequently confirmed in a subsequent Will to which he is not a witness – **RE MARCUS**
5. Where there are at least two other witnesses to the will apart from the beneficiary– s. 8, Wills Law, Lagos

6. **PRIVILEGED WILLS – RE LIMMOND**

7. Where the witnesses is subsequently appointed solicitor to the estate and the will contains a charging clause --- **Re Royce**

ETHICAL AND PROFESSIONAL RESPONSIBILITY OF A LAWYER ENGAGED OR INVOLVED IN THE PROCESS OF MAKING A WILL

1. Duty to take full Instructions
2. Duty to take instruction in his office
3. He must be very meticulous as to include all affected properties
4. diligence and dedication
5. duty of care
6. duty of professional secrecy and privilege (not to disclose confidential information)
7. duty to render honest and candid advice
8. fiduciary duties- take steps in best interest of the client
9. duty to act within the bounds of the law
10. duty to avoid conflict of interest
11. duty of honesty and transparency
12. duty to charge the will adequately but not excessively
13. draft the will to professional standard
14. duty to advice beneficiary not act as a witness
15. To advise the client on the need for residuary clause; why a beneficiary or his spouse should not act as witness; on the options, procedure, and conditions for execution of the Will; custody of the will, testamentary restrictions, etc.

WEEK 15

WILLS AND CODICILS PART II

TYPES OF GIFTS IN A WILL

GIFT IN A WILL MAY BE EITHER (two major classifications)

1. A DEVISE OR (gift of real property)
2. A LEGACY/ BEQUEST (personal properties)

When you are confused you can simpliciter use the word gift

THERE ARE MAJORLY THREE TYPES OF A GIFT

❖ **GENERAL GIFT**: gifts not ascertainable. Particulars of the property not given. Nature/name – particulars—source. The gift is mentioned no description. Examples:

- A duplex to my driver, Joe.
- N2 million to my wife, Mercy,
- 10,000 shares in reputable company to Sam, my cook;
- A Toyota Camry car to my secretary, Ify,
- A house to my second wife Ify.

SPECIFIC GIFT: gifts in a will easily ascertainable and identifiable—the property must be certain and describe in manner as to separate it from other properties in the estate.—Nature+ source+ particulars.= specific (a two storey building, 22 Ahu Lane Ikeja Lagos).

"all my shares in GTB to my daughter"

Specific gift are subject to ademption.

DEMONSTRATIVE GIFT: type, nature and source of the gift is mentioned but the particulars are not mentioned as to identify the gift from other gifts in the source. Nature + source- particulars. Type+ nature+ Source—Particulars.

Examples:

- A duplex along Adeola Hopewell Street, Victoria Island, Lagos to my driver, Joe.
- N20 million from my account at GTBank to my wife
- N10, 000 shares from my shares in Julius Berger Plc, to Sam , my cook
- One of my Toyota Camry cars to my secretary, Chy;
- A house at Enefa Chamberlain Estate, Lekki, Lagos to my second wife, Comfort.

ANY OF THE THREE TYPES ABOVE COULD BE PECUNIARY OR OTHERWISE, CONDITIONAL, ANNUITY, RESIDUARY,

ANNUITY: a periodic gift- Re Earl of Bekeley. It could be anything but usually money. It is a gift to be given periodically after the death of the man. When a provision is made in a gift …

EXAMPLES:

a. Ten bags of rice to Obalende Motherless Babies Home, Lagos, every quarter of a year for ten years
b. N30 million to each of my sons every year, for twenty years.
c. N2 million to Mr Jasper, the principal of Achievers High School, Ibadan, Annually for five years.
d. N2 million to the principal of Achievers High School, Ibadan, Annually for five years.
e. N1 million to each oof the first 5 best graduating students of the nigerian law school, every

IMPLICATIONS OF ANNUITY GIFT

It may create difficulty of execution for the executors taken into consideration winding up of the estate. What to be done? A trust should be created in respect of the Annuity gift. E.g Noble Price Award

NB: the will might have appoint trustees for the annuity

CONDITIONAL / CONTINGENCY LEGACY - attached to the condition

RESIDUARY GIFT: gifts of the remainder of the testator's property. Is contained in the residuary clause. It is made to the following gifts:

Gifts covered under the residuary estate:

a. All properties not covered by the will, not specifically mentioned in the will.
b. All failed gifts under the will
c. Properties acquired by the testator or testatrix after the making of the Will
d. Gifts renounced under the Will/ rejected gifts, the persons given the gift rejected it.

FAILURE OF GIFTS

Presence of vitiating factors:

1. Ademption
2. Lapse
3. Public Policy/ Illegality
4. Uncertainty
5. Abatement
6. Disclaimer
7. Conditional Gift: where the condition fail
8. By operation of law
9. Beneficiary or his spouse attesting the will.

1. **ADEMPTION:** in specific legacy, gift no longer forms part of the estate. The gift made under the Will has been divested of the testator at the time of his death. The gift is no longer in existence or has been fundamentally altered at the time of the death of the testator. A gift is only ademed where the gift is no longer in existence at the time of death of the testator. NB: change in name or format will not amount to ademption. There was a gift at the time of making the gift but upon the death of the testator he should.

   Ashburn V MacGuire. Occurs where gift is not in existence at the time f testator's death. Beneficiary will lose gift by reason of ademption in any of the following case:

- Gift lost or sold before testator's death.
- Property subject to contract
- Property compulsorily acquired by the state: depends on time of acquisition. Re Galway
- Natural character of gift fundamentally altered or extinguished. Re kupyer… company has wound up.
- Property subject to option to purchase.

EXCEPTIONS TO ADEMPTION

- Where the property / gift has changed in form not in character;
- Change of name is not ademption;
- Acquisition, take over, merger, etc not ademption
- Sub-division, consolidation of a\shares not ademption.

2. **ABATEMENT:** insufficiency of estate to provide the gift i.e. insolvency of estate. It arises when at the death of testator, after settlement of the debt of the testator there are insufficient property to satisfy the gift. When the property in the estate is not sufficient to meet the demand of the gift.

ADEMPTION	LAPSE
It goes to the gift/property	It goes to the beneficiary
The gift cease existence before the death of the testator	The beneficiary predeceased the testator
For ademption to occur there must be: a. The gift must change fundamentally b. The gift cease to exist c. Gift is lost or sold before the testators d. Property is subject to contract Property acquired by the state before the testator's death The following are not ademption: Change of name of the gift Compulsory acquisition may or may not amount to ademption. No ademption in merger of companies NB: the principle applies to specific gift. A general and demonstrative cannot fail for adempt.	Exceptions even where the beneficiary predeceased the testator 1. Class gift 2. Gift made for fulfilling or satisfying an obligation. 3. Presence of substitutional gift. Beneficiary is a child of the testator and survived by children.

3. LAPSE: beneficiary died before the testator. Section 33 Wills Act; section 24 Will law , Lagos.

EXCEPTION TO LAPSE:

a. Class gift- Joint tenancy or tenancy in common… one of the beneficiaries of the gift predeceased the testator…
b. Substitution gift: given to Mr A but if he dies before the testator then to Mr B …
c. Gift made in settlement of debt owed or promise made by the testator. It will not be treated as a gift but a debt to be settled. Exepet if the gift is more than the debt to be settled.
d. Beneficiary is the testator's child and died leaving an issue … section 33 Wills Act, 24, Will Law (Lagos), 28 Wills (Western Nig); 26 Wills Law (Abia).
e. Residuary clause: a gift will not fail if there is a residuary clause.

4. **UNCERTAINTY:** of gift or beneficiary; public policy, promotes illegal purpose. Crime offends the rule against perpetuity, fraud or illegality can apply to the gift and the beneficiary. If it affects the beneficiary, the gift will fail. Take note of effect in general and specific and demonstrative gift.
5. **Disclaimer by the beneficiary.**
6. Attestation: section 15, when the attesting witness is a beneficiary /spouse is attesting witness. So neither the beneficiary nor his spouse should not attest to the will.
7. Section 18 marriage, divorce, and annulment of marriage.
8. Gift conditional upon a condition not fulfilled: failure to fulfil the condition therein.
9. Property not owned by the testator –*nemo dat quod non habet.*
10. By operation of law
11. Public policy/illegality/immoral
12. Presence of other vitiating factors

VITIATING FACTORS

UNDUE INFLUENCE: it arises mostly in breach of fiduciary duties. E.g. Priest and the Congregant, Lawyer and Client, Doctor and Patients, Teachers and Students. When much pressure is exerted to the extent that the content of the will does not reflect of the intention of the testator. NB: issues of morality does not amount to Undue Influence.

- ❖ Onus is on the challenger to prove. Johnson V MAJA.
- ❖ Persuasion is not undue influence.
- ❖ Inducement short of coercion is not undue influence … Hall v Hall
- ❖ Immoral considerations do not constitute undue influence – Maja V Johnson.

FACTORS TO CONSIDER WHERE UNDUE INFLUENCE IS ALLEGED:

i. Was the will executed?
ii. Was it a Free exercise of volition?
iii. Soundness of the testator's mind at the time of making the will

iv. The knowledge of the content of the at the time of execution

a. Fraud: it extends to Mis-representation
b. Suspicious circumstances: it arises where fiduciary exist. It does not necessarily vitiate a will/gift. Where raised, propounder must discharge the suspicion; otherwise will/gift would fail. Okelola v Boyle, Wintle V Nye, Re Solicitor circumstances that may give impression of existence of undue influence. It may arise in fiduciary relationship. It does not automatically invalidate the will. For the will to be affected, credible possible evidence must be led to prove that there was suspicious circumstances/ undue influence of the testator. Where the situation of SC is raised, it automatically place the burden to proof honest discharge of fiduciary duty on the lawyer/ fiduciary and non-existence of SC

   Where it discovered that a large sum of gift is given to a lawyer who drafted the will, it may raise suspicious circumstances and thus raise breach of fiduciary duty. Often convinced in situation where the distribution is irrational. The onus is on the challenger to proof undue influence on the part of the propounder See WINTLE V NYE and IN RE A SOLICITOR
c. Mistake: mistake of law invalidate the entire will. Mistake of fact nullifies or void the gift. Okelola V Boyle

EXCEPTIONS TO BENEFICIARY WITNESSING A WILL;

a. Gift made in settlement of debt. Section 15 Wills Act , section 8 Wills Law , Lagos
b. Beneficiary married witness after executing- Aplin v Stone
c. Witness is only a trustee of the gifts … Creswell V Creswell
d. Gift is subsequently confirmed in another will, not attested to by the beneficiary in question. Re Marcus.
e. Where there are at least two other witnesses to the will apart from the beneficiary section 8 Wills Law Lagos
f. Privileged wills : Re Limmond
g. Where the witnesses is subsequently appointed solicitor to the estate and the will contains a charging clause. Re Royce

REVOCATION OF A WILL

Simply means to destroy it. It is a process of jettisoning a will. To bring the life a will to an end.

MODES OF REVOCATION OF A WILL

1. Duly executed will or codicil
2. Destruction with an intention to revoke a will
3. By a Subsequent valid marriage
4. Subsequent will or codicil
5. Duly executed Written declaration with an intention to revoke the will… section 9

REVOCATION BY SUBSEQUENT MARRIAGE

Only a valid/legal marriage under the Act can revoke—section 18 Wills Act 1837 as amended and Section 11 of Wills Law Lagos.

Voidable marriages still revoke the will- Re Robberts.

Where a man make a will and subsequently got married, the subsequent marriage invalidates the Will.—GENERAL RULE.

Only lawful/legal marriage … Re Gay.

EXCEPTIONS:

a. Marriage under native law and custom: section 11 Wills Law Lagos ,
b. Void Marriage: Mette V Mette
c. Will made in contemplation of Marriage: RE Langston. where A makes a Will in contemplation of a future marriage to Miss B and the marriage takes place with Miss B, the subsequent marriage will not revoke the Will to Miss A. you need not use the word "fiancée"

CONDITIONS:

i. The will must have been made in contemplation of the marriage to a particular person.

ii. The marriage must happen or take place.

vii. It must happen between the contemplated parties.

d. Where the marriage is a mere affirmation of an earlier marriage between the parties.
e. Will made before a marriage under the Act but after a marriage under native law and custom to the same spouse. See Jadesini v Okotie- Eboh
f. Will made in exercise of power of appointment—s. 11 Wills Act, Lagos, Re Park
g. Please note

REVOCATION BY SUBSEQUENT WILL OR CODICIL

If a testator who has made a valid will thereafter make a second valid will, the second will or codicil may or may not revoke the earlier valid will depending on the circumstance

Ways in which a later will can revoke an earlier Will or part of it:

a. EXPRESS REVOCATION: Where a later will or codicil contain a revocation clause, all earlier wills and testamentary documents are revoked. Henfrey v Henfry
b. **IMPLIED REVOCATION:** Where a later or subsequent will or codcil or a part of it is inconsistent with an earlier Will or part of it. The part inconsistent with the later Will in the earlier Will stand revoked. It does not have revocation clause.
c. **REVOCATION BY WRITTEN DECLARATION**—section 20 Wills Act: see in the goods of Durance. Written declaration to effective in revoking the will must have been executed in accordance with section 9 Wills Act. whenever the testator makes a declaration in writing revoking a particular earlier will. The earlier will stand revoked if the following conditions are satisfied;

1. Written declaration must be executed in line with section 9 Wills Act
2. The Written Declaration must be done voluntarily with a intention to revoke the will

d. REVOCATION BY DESTRUCTION

TO BE VALID, TWO ELEMENTS MUST CO-EXISTS:

1. Actual (physical) destruction
2. Intention to revoke by destruction See Hobbs V knight.

Symbolic destruction not enough: Cheese V Lovejoy

Revocation of a will by destruction does not revoke a codicil to the will: in the Goods of Turner

Destruction need not be total, substantial destruction is sufficient.

CAN BE DONE IN TWO WAYS:

1. Testator may destroy the will himself with the requisite intention to revoke
2. The testator may appoint an attorney to do it on his behalf.

Where the testator destroys the Will himself

CONDITIONS

a. The testator must have the intention of revoking his will
b. The actual destruction of the will must have happen
c. The two conditions must co-exist(both the animus and the actus)

Where the Testator appoints someone to destroy on his behalf/ via written instructions

Where a man, intending to revoke his will, chooses to appoint another person to destroy it on his behalf, the destructions will not amount to revocation unless the following conditions are satisfied:

a. the instruction to the agent must be in writing

b. That other person must actually/ physically destroy the will
c. The destruction by the other person must happen in the presence of the testator himself.

CODICIL

It is a supplemental to a will. It must in creation obey all the rules governing drafting a will.

Greenwood v Cozens, In the Goods of Clements

USES OF CODICIL

1. To amend a will
2. To revival a will
3. To revoke a will
4. To republish
5. Subtract or add to a will

CONDITION FOR A VALID CODICIL

- All codicil must state the will it refers to
- All rules on wills governed codicil
- If a codicil is granted probate, it forms part of the will refereed to
- Every codicil must end with a clause referring to a will it is made

REVIVAL AND REPUBLICATION OF A WILL

Republication: any act or writing by or on behalf of the testator affirming or confirming the validity of an existing Will or of the content of a will.

1. re execution with proper formalities as provided by section 9 Wills Act

Duly executed codicil containing reference to the will or codicil republished. **Re JC Taylor.**

Note that republication does not bring back a revoked will.

REVIVAL: OF A REVOKED WILL

Re execution in solemn form section 9

By a duly executed will/codicil with the requisite intention tio revive the revoked.

- Reviving a dead will
- It applies to a revoked will—section 22 Wills Act
- Revival is same way as republication
- The intentions are different as well as the effect
- Revival validates all alterations not attested to in the will
- For a re-execution or codicil reviving the will must expressly state REVIVAL
- Intention to revive must be express.
- Note that revival or invalidates alteration

CUSTODY OF A WILL

1. In the Bank
2. At the probate registry —no obligation to deposit will at the probate registry
3. With a Solicitor (testator's solicitor)
4. Could be kept by the testator In a safe place either in his house or office
5. With a trusted younger relative or friend

WEEK 16

WILLS AND CODICILS (3) DRAFTING

LIMITATION OF RIGHT OF AN INDIVIDUAL TO MAKE A WILL

It is trite that persons of or above 18 and 21 years depending on the jurisdiction can or is free to make a will. Age Restriction —18 years in Lagos and 21 years under the Wills Act.

1. Limitation under Customary Law—s. 3 of the Wills Law Edo state—will cannot circumvent the provision of a custom. *Igiobe* under native law and custom.
2. Islamic Law Restriction and
3. Provision on reasonable financial provision in the statutes.

CUSTOMARY LAW:

- IDEHEN V IDEHEN (1991) 7 SCJN(PT II) 196
- LAWAL OSULA V LAWAL OSULA 1995…
- **EXCEPTIONS TO ENTITLEMENT TO *IGIOGBE***
- Failure to perform the second burial rights and if the son is the killer of the father.
- EGHAREVBA V ORUONGHAE (2002) FWLR (PT 121) 1945—*igiobge* is not applicable to property outside Benin kingdom. Therefore Igiogbe resides in Benin kingdom.
- If the first son of the family predeceases the father, the property devolves to the eldest male of the family.
- He can only make a will re-enacting the Islamic law provision.

ISLAMIC LAW LIMITATION

- S. 4 Wills Law Kwara State:
- AJIBAIYE V AJIBAIYE (2007) ALL FWLR (PT 359) 1321: he was a Muslim and made his will in contravention of the Islamic law.
- YINUSA V ADESUBOKAN (1971) ALL FWLR (PT 359) 1321—wills act will be applicable. A man made his will contravening the Islamic law. It was held to be heled to be valid.
- If the state has not adopted expressly the provisions of such Islamic or customary law. Restriction therefore will not apply.

RESTRICTIONS IN THE STATUTES

PROVISIONS FOR FAMILY AND DEPENDANTS—Section 2(1) Wills Law Lagos

- Who can bring the Application—the wife, children and other members of the family depending on him. If the wife is the breadwinner upon theier agreements while the husband is house husband.
- The Application should be made within six months from the grant of probate. Therefore this is the period when the right is exercisable.
- The Application must show that the person is dependent on the testator when he was alive.
- The application is made to the high court.
- The section may not apply where there is an existing decree of judicial separation among the spouse at the time of death.

TAKING INSTRUCTIONS

1. Have a check list of questions to be asked: on your letter head with details of the chambers contained therein.

2. Particulars of testator: Full Names of the testator, address and occupation, Former Names, Aliases, Address.

3. Particulars of attesting witnesses

4. Particulars of intended beneficiaries

5. Particulars of executors/ trustees

6. Particulars of the testator's properties

7. Previous Will/Codicil (if any)

8. Provisions for substitutional gifts

9. Funeral Directives or expenses should be left out of the will (not advisable).

10. Residuary gift

11. Medical Certificate—to prove soundness of mind while making the Will.

12. Custody of the Will.

12. Religion and place of origin of testator.

13. Whether the testator is married and the nature of marriage

14. Particulars of relatives or dependents of the testator, if any.

15. Instructions on the remuneration of executors.

16. Instructions on the residuary clause.

17. Debts and liabilities (if any)

18. Manner of distribution of the estate.

20. While drafting, make precision, accuracy and effectiveness of communication and not literary contrary

PARTS OF A WILL

1. **COMMENCEMENT**—

   THIS IS THE LAST WILL (AND TESTAMENT) OF ME, MR JOSIAH ABDULLAHI MISTURA UCHE FORMERLY KNOWN AS MR MAZE OBOTIDEM ALIAS ONE NIGERIA, MALE, ADULT OF 44 OKESUNA STREET, AJA LAGOS, made this ------ day of ----------20----------.

2. **REVOCATION CLAUSE--**

   I revoke all Wills and testamentary documents previously made by me.

3. **APPOINTMENT CLAUSE:** Appoint executors and trustees:

   I appoint my wife, Gladys Mistura of 44 Okeusna Street, Lagos Island, Lagos state and Mr Felix Yellow, ,my bosom friend of 66 Adigun Street, Victoria Island, Lagos to be the executors and trustees of this my will.

4. **CHARGING CLAUSE**: ordinarily, the works of executors is gratuitous. The clause enables professional and other executors to the estate charge reasonable financial fees for services rendered.

   I Direct that any executor or trustee of this my will who is a solicitor or other professional may charge and be paid all usual fees for work done by him or his firm in proving my will and carrying out its trusts including work outside the usual course of his profession which he could or should have done personally had he not been a professional person.

5. **DEVISE CLAUSE (DISPOSITION)**: use paragraphing techniques to give out properties. In roman numerals preferably in large estate. . Not the effect of certainty while devising a property. Gifting clause, gifting the gift or types of gift. Use words like I give my …

6. **RESIDUARY CLAUSE**: to cater for property acquired after the will and failed gift in the Will. Non-inclusion will occasion partial intestacy.

I give the whole of my estate to such my children living at my death as attain the age of 21 years and if more than one in equal shares.

7. TESTIMONIUM CLAUSE

AS WITNESS my hand this first day of May 2016 or in witness of which the testator has executed this Will in the manner below, the day and year first above written.

8. ATTESTATION AND EXECUTION CLAUSE

SIGNED by the testator

Josiah Abdulllah Mistura ----------

Josiah Abdullah

In our joint presence and then by us in his presence and in the presence of each other subscribed our names as witnesses.

OR

SIGNED by the testator

……. in our presence and

by us in his presence

1. Name

Address

occupation

Signature

2. Name

Address

occupation

Signature

9. FRANKING:

Prepared by:

CLEMENT OWOLABI ESQ.

PARALLELOGRAM & CO.

ADDRESS

ETHICAL ISSUES

1. Draft the will the way the man has given the instruction.
2. Failure to take instructions as to executors is a negligence

EFFECT OF FAILURE TO INCLUDE EXECUTORS

Obtain letters of administration, will attached …

WEEK 17

PROBATE PRACTICE

This is the procedure for grant of probate and letters of administration both in contentious and non-contentious cases. To administer the estate f the deceased probate or letters of administration would be required.

- Until probate or letters of administration is granted, anybody who interferes with the estate of the deceased is called an executor de son tort. See the case of Bank of west Africa Ltd Rickets (1959)NRLR
- Examples Mllam Haruna Gidado died on the 10th of August after he had duly executed his will. In his will, he made Mr Ijesha and Mr Richard his executor of the estate.
- Administrators derive their power from letters of administration while executors derive their power from the will. Probate is a mere confirmation of such power.
- Definition: prove of ascertainment in law and in fact that the words and writings that constitute the will of a deceased person
- It is also the fact that the will of a deceased person has been admitted and the personal representatives is now empowered to administer the estate of the deceased.
- Probate goes with testacy
- Renunciation: renouncing executors hip or administration of a deceased estate.
- Double Probate—can only be given to maximum of 4 at a time, if there more than four, maximum of four will be appointed and power will be reserved for the others. Same situation where an infant is appointed and probate has been granted to other executors, he apply for grant of double probate when he attain majority.
- Re-sealing: affirming the grant of a probate in administration of property located outside the state of issue. Application is made to the HC of state where the property is located for re-sealing of the grant.

APPLICABLE LAWS:

- Wills Act, 1837
- Administration of Estate laws of states
- Wills Laws of various states
- Judicial precedent
- High court civil procedure rules (Abuja and Lagos)
- Marriage Act
- Interpretation Act
- Evidence Act 2011
- Rules of professional conduct for legal practitioners
- Legal practitioners Act
- Constitution of Federal Republic of Nigeria 1999 as amended.

TYPES OF GRANT

1. Grant of probate
2. Grant of administration with the will annexed;
3. Grant of simple administration also known as grant of letters of administration

GRANT OF PROBATE

This is obtained when the deceased died testate, leaving a valid will with executors validly appointed in the will.

GRANT OF ADMINISTRATION WITH THE WILL ANNEXED

- This is obtained when the deceased died without appointing executors in his will, where the executors appointed are minors or where they renounce probate
- Note: where there is a refusal to act or disqualification to act by the executors, administration with the will annexed will be annexed will be obtained.

GRANT OF SIMPLE ADMINISTRATION

- This grant will be issued where the deceased died intestate either wholly or partly.
- Where he died partially estate, the part of his estate not covered by his will would be administration by the grant of simple administration.
- Letters Of Administration of Estate is giving where there is intestacy. It is a prove to those considered as administrators of the deceased estate

DEFINITION OF TERMS

1. **PERSONAL REPRESENTATIVES**: these are persons upon whom the estate of the deceased is vested. this include executors or administrators
2. **INTESTATE**: a person is said to die intestate when the person died without making a will or where the made a will but left some parts of his estate not covered by the will. See section 2 Administration of Estates Law Lagos.
3. **CITATION:** Citation—where person to grant of probate refuses to do so, person next in rank will make application by making citation of the person entitled. **this is a notice of warning to :**

a. An executor to prove will
b. A caveator to disclose the nature of his interest in the estate of the deceased that conflicts with the interest of the applicant
c. Accept or reject probate or letters of administration
d. Order 58 rule 18 Lagos

4. **TRUST CORPORATION:** public trustee or corporation appointed by the court to be a trustee of, or be entitled to the estate of the deceased under the public trustee law.
5. **CAVEATOR:** a person who raises objection to the grant of probate or letters of administration. His aim is to ensure that no grant is made without notice to him.
6. **PROPOUNDING A WILL: to present a will to a court or other authority in order for its validity to be established.**
7. **Propounded of a will: these are persons who take necessary steps to ensure that probate is granted. They are interested parties who can also be executors of the will.**

OBTAINING A GRANT OF PROBATE

- Probate is the judicial confirmation of the authority of the executors to carry out the provisions of a will.
- Granted upon an application made to the probate Registrar Of the High court of each state of the federation. Order 57 Rule 1 **Lagos it is made by way of petition. And order 49 Abuja by letter writing.**

PROCEDURE

- Upon the death of the testator the person in whose possession or custody the will must lodges same at the probate registry of the state in question immediately after his knowledge of the testator's death. In Abuja he has 14 days after his knowledge of the deceased's death to lodge the will. Order 49 rule 2 Abuja. …
- In Lagos within three months he that has the custody of the will should apply for probate.

TIME OF GRANT

1. **In Abuja: 7 days after testator's death.**
2. **In Lagos -14 days after the testators death see order 57 rule 1 (2) Lagos/.**

WHO IS ENTITLED TO A GRANT OF PROBATE?

Where a person dies testate, the power to apply for probate lies with the executor or executprs.

Where the executors renounce probate renounce probate they will be granted administration of the will annexed they will be granted in this order:

a. The executor where there is a will
b. Any residuary legatee or devisee holding in trust for another person
c. Any residuary legatee or devisee for life
d. The ultimate residuary legatee or devisee including one entitled on the happening of a contingency , order 58 rule 23 Lagos

GRANT OF PROBATE WHERE THE TESTATOR IS DOMICILED OUTSIDE NIGERIA

- The executors named in the will shall be entitled to probate unless the court makes a contrary order that probate be granted to any of the following:
- A. persons entrusted with the administration of the estate by the court
- Persons entitled to administer the estate by law
- Persons as the judge may direct.

PROCEDURE FOR GRANT OF PROBATE

- The procedure depends on whether the grant is contentious in nature or not. Probate in Common Form- Non Contentious. Probate in Solemn Form- Contentious.

CONTENTIOUS WHEN:

- When the probate is sought to be revoked or denied.
- When the validity of the will is contested
- Where the appointment of the executors is ….

NON CONTENTIOUS GRANT

- Known as probate in common form
- There is caveat but no citation.

STEPS FOR GRANT OF NON CONTENTIOUS PROBATE, PRELIMINARY MATTERS

- **SEARCH FOR THE WILL**— relatives begin the search by inquiring in writing to the probate registrar, starting the full names of
- **DISCOVERY, MARKING AND READING OF THE WILL**

If the will is in the custody of the solicitor to the testator, he us expected to forward it to the probate registrar, who will make necessary arrangements for the opening and reading of the will.

Once the will is found, it will be marked and subsequently read at a designated

- Where the will cannot be found and there is a reasonable ground to believe that a person has knowledge of a any testamentary document or documents of the deceased testator the court may summarily order that such a person be examined and interrogated. He may be asked to produce the document within his possession. Order 48 rule 6 Abuja usually after the burial.

APPLICATION FOR PROBATE

- After the discovery and reading of the will application would be made for probate by way of a letter address to the probate Registrar in Abuja and by way of petition Lagos.
- Documents required to initiate the grant of probate
- A. CTC of the will
- Death certificate of the testator
- Application letter. And petition in Lagos

CONTENTS OF THE APPLICATION LETTER

a. Particulars of the testator; name, age, religion, state, profession, marital status, spouses names, or children.
b. Date and place of death of the testator
c. That he was resident within the jurisdiction before his death
d. That the testatrix was found to have made a will.
e. Names of the executors if any

- DOCUMENTS REQUIRED TO PROCESS THE APPLICATION
- 1. Copy of the will- order 57 Lagos ., Order 48 Abuja

- Death certificate of the testator order 57 , order 49 rule 8 (5)
- Proof of identity of the applicant. order 57 , 49 rule 9 (2) Abuja
- Affidavit stating the date and place of domicile shortly before his death
- Declaration of all personal properties of the testator.
- Reading of the Will.

NB: if upon the death of an individual, person in possession of testamentary document have obligation to submit to the probate registry

- In Abuja, it must be done within 14 days (O. 48 r 4(2)) and in Lagos within 3 month, Order .58 r. 15.
- Administrator derives power from LOA
- Executors derive their powers from the Will, Probate is a mere confirmation.

PROOF OF THE WILL

- Where the executor is expected to prove the will. Where he fails, neglects or delays in doin so a notice shall be served on him to prove the will or renounce probate (citation) and he must within 21 days of the court to prove the will or renounce probate order 58 rule 28 Lagos.
- It is 14 days in Abuja order 48 rules 7 and 8 Abuja.
- Citation must be accompanied by an affidavit verifying the facts contained therein. Order 49 rule 58 (2) Abuja. Order 58 Lagos
- It must be served personally.
- Only a person interested in the estate of the testator can cause a citation to be issued.

PROOF OF DUE EXECUTION

- The registrar of the court must be satisfied as to the due execution of the will and that it contains a proper attestation clause before admitting it to probate. Order 57 Lagos, 49 r 31.

STEP FIVE: GRANT

- Upon satisfaction of the registrar that the will was duly executed and that the testator made the will with knowledge of its contents the registrar will issue probate

CONTENTIOUS:

a. **Search …..**
b. **Application**
c. **Caveat: opposition to the grant of probate is expressed by filing a caveat where this is filed, the registrar shall refer the proof of the will to the court.**
d. **The caveat is in for m 189 (Abuja) or probate Form 3**

MODE OF APPOINTMENT OF EXECUTORS

- Good practice—minimum of 2 and maximum of 4
- In some instances, 1 is advisable—successor under the Act, corporate bodies, administrator general
- Expressly—stated in the will expressly
- By Tenor—can be reasonably and implied inferred from the tone of the Will
- By description—e.g partners at the date of my death in the law office of Ramadan& Muhammad, my solicitors
- By authorisation/power of nomination—where somebody is appointed in the Will to appoint some people as the executors. Yardsticks and guide for appointment may be given
- Appointment in Official Capacity—E.g Imam of Law School Lagos is appointed as my executor

STEPS BY THE EXECUTOR AFTER THE DEATH OF THE DECEASED

1. Proving the will
- May be done in solemn form—contentious
- Common form—non-contentious
2. Reading the will, at the office of the probate registrar—will be marked confirming the valid execution of the will

3. Application for grant
4. Oath of executorship will be taken
5. Payment filing fees.

SOLEMN FORM (CONTENTIOUS)

There is doubt as to the validity of the Will.

Where there is no doubt as to validity of the will—COMMON FORM

PROCEDURE FOR OBTAINING PROBATE

- Application to obtain probate in form of a letter.
- Attach a copy of the will and the death certificate
- To: HCLS in matter of estate of late Mr. john…. Who died on the ….address….(for affirming the jurisdiction of the will)
- See. 48(7) ABj and O. 58r 18, Lagos. An unwilling executor must fill renunciation form.

NB: for citation against unwilling executor, in Abuja, it may be done by the court, person having interest under the will or person in line. Se`e O48 r 7 and O.49 r 4. It must be done within 14 days.

In Lagos, it is only somebody claiming an interest. See 58 r 18. The person being cited has 21 days to take up the grant while in Abuja, they only have 14 days.

Forms to be collected.

a. Application for grant of probate
b. Affidavit of attesting witnesses
c. Oath of executors-- justification
d. Inventory – list of all the properties of the deceased
e. Particulars of lease/free hold properties
f. A schedule of death and funeral expenses
g. Bank certificate. Shows the things the deceased have in the bank

CAVEAT—O 58r 13 Abj, and O. 59 r 18 Lagos

- Life span of caveat. 3 months Lagos and 6 month in Abuja'
- If caveat is filed, the propounder will file a warning notice within 8 days after the file of the caveat.
- Once caveat is filed, probate should not be issued.—see DAN-JUMBOH V DAN-JUMBOH until matter raised in the caveat has been resolved.
- Once warning notice has been served, caveator should enter appearance within 8 days.
- Not in all cases the caveator is to enter appearance, rather, he can do any of the following three;

a. Withdraw his caveat—by notice
b. If he has an interest, enter appearance within 8 days
c. He may serve an issue summons or direction—O. 49 r 47 Abuja and O.59 r 18 Lagos

- Where the caveator doesn't enter appearance the party warning can file an affidavit stating that the caveator has been served and no evidence of response.
- Forms in Lagos, probate Form 3/ 4 –Lagos
  In Abuja, 189
- Warning notice—form 190 in Abuja or probate form 5 Lagos

CITATION

- Issued to an executor asking him to refuse or ate the ground
- Issued to asking somebody to review he rule.

Cease of Right of Executorship

- Death of executor after death of the testator but before taking probate
- After citation of the executorship
- Where the beneficiaries have renounced probate. See s. 6 AEL Lagos

LETTERS OF ADMINISTRATION

TYPES

1. LOA without will—no will---not granted within 14 days/ 21 days 48 r 1 (3) Abj, O57 r 1(2) Lagos
2. LOA with will annexed—(executors renounce, executor died before grant, sole executor died before grant, executors reserved power for...)
3. LOA (without Will) DE Bonis Non—administrator dies without completing the administration
4. LOA will annexed—will not be granted within 7 days/14 days of the death
5. LOA will annexed de Bonis Non

APPLICATION FOR LOA

- Application made to probate registrar
- Full name of the deceased
- Date of death
- Last place of abode
- Particular of proposed administrators

FORMS TO COLLECT

- Application for a grant of LOA (W/O Will)
- Oath for administrators
- Justification
- Inventory
- Declaration as to next of kin
- Particulars of freehold/lease hold property
- Publication of Application for LOA—(not in probate)—to give notice to an intending caveator

Who can bring Application? S. 49 AEL—monogamous marriage

- A surviving spouse
- Surviving children
- Father or mother of the deceased
- Brother or sister of the full blood, etc

CUSTOMARY MARRIAGE

- Take after the native and custom of the deceased.

Right to administer an estate

1. An infant, imbecile—limited grant to a guardian
2. Lunatic—limited grant to guardian
3. Person found guilty of murder/manslaughter
4. Resident outside the country—temporary grant to his attorney
5. A minority or life interest—no sole administrator, there must be an adjoining administrator

Number? Maximum of 4 and minimum of 2

Bond and Guarantee

- Sureties—not needed in probate
- Publication

- Issue of grant

CHAIN OF EXECUTORSHIP—broken if the last executor dies intestate

CHAIN OF REPRESENTATION—broken if the last administrator dies whether or not intestate

LIMITED GRANT

- Limited as to property
- Limited as to purpose—just for a particular purpose. E.g. to be able to execute a particular act
- Limited as to time—temporary grant to guardian of an estate

SPECIAL GRANT

- Grant to creditors
- Grant pendete lite—to be able to prosecute an action
- Grant durante absentia—to attorney to do an act
- Grant to recoup investment
- Grant ad litem—to prosecute a matter
- Grant ad colligenda bona—grant to preserve perishable items within the estate—s. 26 AEL

EXECUTOR DE SON TORT

- Executor that intermeddles in an estate. Steps to perform duties without the authority of probate registry. O. 48 Abj and O58 and 59 Lagos
- Liability—5000—Abuja and 50000—Abuja
- Also liable in contempt in Abuja and to a fine

REVOCATION OF GRANT

Reasons:

- Later will found after grant of LOA
- Later will substantially inconsistent with the first will
- Grant obtained fraudulently
- Persons thought to have died will be revoked.—all act done under the revoked grant before revocation will stand
- Found that person granted does not have sufficient title for the grant

LOA with Will Annexed

Order of priority

ADMINISTRATOR GENERAL

- Can be appointed in a will
- Takeover in unrepresented estate

WEEK 18

PERSONAL REPRESENTATIVES AND GRANT OF ASSENT

- Personal Representatives: they include both executors and administrators
- Persons who administer the estate of the left behind by the deceased. They step into the position of the deceased
- Note that both realty and personalty constitute the estate.

MODES OF APPOINTMENT

- Expressly in the Will—when stated in the will.
- Impliedly by tenor of the will, reading through the will, by inference
- Through nomination in the will
- By the court:

Query: is it possible to have a sole executor where there is a life or minority interest? No it is not possible.

- By Representation (operation of law), when there is a break in execution/transmission …
- Executor de son tort (Not Personal Representatives per se): they intermeddle with the estate. He can be asked to take up the grant. Executors properly so appointed may be executor de son tort—liable on account and to third parties or creditors as if he were an executor. Also liable to account for the items he has dealt with.
- APPOINTMENT AS PERSONAL REPRESENTATIVE
- A natural person
- A trust corporation

RIGHT TO ADMINISTRATION

DISQUALIFICATION

1. Infant (minor)
2. Lunatic
3. Person found guilty of manslaughter/ murder of the testator—permanent disqualification on grounds of public policy. The above qualification depends on whether the testator dies testate or intestate. **See section 49 AEL. Monogamous or customary marriage.**

ADMINISTRATORS /NEXT OF KIN

- Determined on whether it is a monogamous or customary marriage

MONOGAMOUS MARRIAGE—s. 49 AEL—OBUSEZ V OBUSEZ

1. Spouse
2. Children
3. Parents
4. Brothers and sisters of whole blood
5. Brothers and sisters of half blood
6. Grand parents
7. Creditors
8. Administrator general

RIGHT TO REPRESENTATION IN TESTACY

Note O 58 r 23 Lagos

1. The Executor
2. Residuary Legatee
3. Any residuary legatee or devisee for life
4. Ultimate beneficiary of the residuary estate

NUMBER OF PR: section 24 AEL :

- As many as possible may be appointed
- Grant is only given to the maximum of 4 at the same time
- Minimum of 1 for executors and minimum of 2 for administrators and maximum of four.
- Grant is according to the order in which their name appears

RENUNCIATION

When the executor is unwilling to at or refused to act. It should be done after the death of the testator. Order 58 rule 25 Lagos: it must be renounced in writing. You renounce wholly or totally not partially. See section 6(3) AEL

Effect of renunciation:

- An executor de son tort is not allowed to renounce after intermeddling.
- Renunciation must be done before the grant of probate
- Retraction of renunciation can be done with the leave of court. It can be done with the order of the court… note section 7 AEL, order 58 rule 25 (3) Lagos

QUALITIES OF A PERSONAL REPRESENTATIVES

a. Willing, able, capable and available.
b. He must be competent
c. Age: should be young and healthy
d. With necessary ability and competence to manage the estate
e. No conflict of interest
f. All must be willing to work harmoniously
g. Literacy
h. Knowledge of specialised business of the testator
i. Persons of integrity and honesty, they must be credible

AUTHORITY OF PR

- Executor—from will
- Administrators—from the grant of LOA
- PRs must act jointly with respect of conveyance in land
- PRs may delegate power of conveyance on one of them
- With respect to personality, authority is several and the act of one may bind the other

Where grant of probate or LOA has not been given and the administrators or executors, how can they protect the intrusion of the estate of the deceased? An action will be instituted as next of kin, after the issuance of the grant, they will amend their processes to reflect the capacity in which they are bringing the action as administrators/executors of the Will.

- Note proper party in an action.
- See BOWLER V JOHN MOWLEM & CO LTD—mere use of the word Administratrix of……
- Note difference between ADMINISTRATORS OF ESTATE OF ADE and ADE ADELADE (Administrator of the ESTATE OF MICHINGAN) see. INGALL V MORAN and STEBBINGS V HOLTS & CO LTD

PROPER

Before grant of LOA—ADE ADELAIDE (suing as the Next of Kin of……)

After grant of LOA—ADE ADELAIDE (Suing as the Administrator of the Estate of….)

DUTIES OF PERSONAL REPRESENTATIVE

- They stand as fiduciaries to the estate they are not trustees. To wind up the estate. Their duty does not inure in perpetuity..
- They owe duties not to the beneficiary but to the estate
- It is possible for the PR to also be appointed as trustees
- They are to administer and ultimately windup the estate
- When they act for realty they act jointly while they can act severally in personalty.

DUTIES

1. To collect in and gather in the assets of the deceased
2. Determine the assets and liabilities
3. What to pay in taxes
4. Duty To pay funeral expenses and debts
5. The duty to prove the will order 58 rule 19
6. To discharge legacies or distributing the estate. To the beneficiaries.
7. To act for the residuary estate or give it to the
8. To make inventory of the assets in the estates section 14 AEL
9. The duty issue assent to the beneficiaries: section 3 AEL
10. The duty of care is also their duty… section
11. To prepare account on periodic or regular basis
12. To prepare account for winding up of the estate
13. They must act jointly with respect to realty
14. They set up to wind up the estate.

POWERS OF PR

Some are statutory while others are under common law, it may be taken away or withdrawn either by the testator in the will or by the court. It includes

1. Power to postpone distribution—s. 47 AEL
2. Power of management s. 43(1)(a) AEL—create mortgage, sell and create leases.
3. To appropriate assets—s. 44(1) AEL—take from the residuary estate with the consent of the residuary legatee to satisfy a legacy under the will.
4. To run or manage the business—to run the business of the testator in the estate as a going concern
5. The power to invest the estste for the benefit of the etstate or the beneficiaries. See section 37 (3) AEL
6. Righ to isnstitute action
7. Power To insure—insure properties in the estate
8. To appoint trustees in respect of the minor's property. Section 45 AEL

REMUNERATION OF PR

- The general rule is that: PR services is gratuitous or pro bono except for reasonable expenses. The PR is not entitled to profit from the estate.
- He is entitled to out of Pocket reasonable expenses
- Where there is a charging clause contained in the Will.
- By an order of the court, especially the estate can afford it. Court can direct payment of reasonable amount to the PR. Provided the estate of the testator may be able to afford it. See. O. 48 r 38 Abj—provided it does not exceed N10, 000 and O 59 r 10 Lag.
- Note that the PR should not be made witnesses because a charging clause operate as a legacy
- Court can direct payment of reasonable amount to the PR. Provided the estate of the testator may be able to afford it. See. O. 48 r 38 Abj—provided it does not exceed N10, 000 and O. 59 r 10 Lag.
- Under the rule in CRADOCK V PIPER—apply to solicitor-trustee. Only applicable to solicitor alone and it is related to service rendered involving litigation. Reimbursement for cost incurred. Or money spent
- Note NBA V KOKU

SUING ON BEHALF OF THE ESTATE

It may be necessary to defend the estate, in the case of PR, executors can commence action in representative capacity, but before the matter is concluded there must be the production of the grant.

Administrators commence as next of kin not as PR see INGALI V Morgan

Mallam V Mqairiga

Note the doctrine of relation back: it will apply to regularise the action not properly commenced when grant is granted.

Note distribution between executor and administrator.

LIABILITIES OF PR

- An executors is liable to estate and creditors
- PR are liable to the beneficiaries for mal-administrations, misappropriation and negligence
- They stand in fiduciary relationship.
- Liability for waste and conversion (Devastavit)
- Liability for co-representation
- Can be cited to take up probate
- Liability for not filing accounts—every 12 months in Lagos and at winding-up of the estate
- They are liable to the creditors and beneficiaries for intermeddling

RELIEF FROM LIABILITY

a. By express provision in the Will that PR be relived of liability. Liability will be relieved only if done in good faith
b. Where beneficiary conceded that he be relieved. Especially if the wrong done was as a result of inducement by the beneficiaries
c. Relieved by the court—especially if proved that the PR acted honestly and reasonably and they ought fairly to be relieved. This is however at the discretion of the court
d. Where the action is statute barred.—if creditors did not bring action for payment of debt, it become statute barred if not brought within 6 years and beneficiaries, within 12 years.

No limitation where the PR acted fraudulently or he is possession of Trust property or trust money.

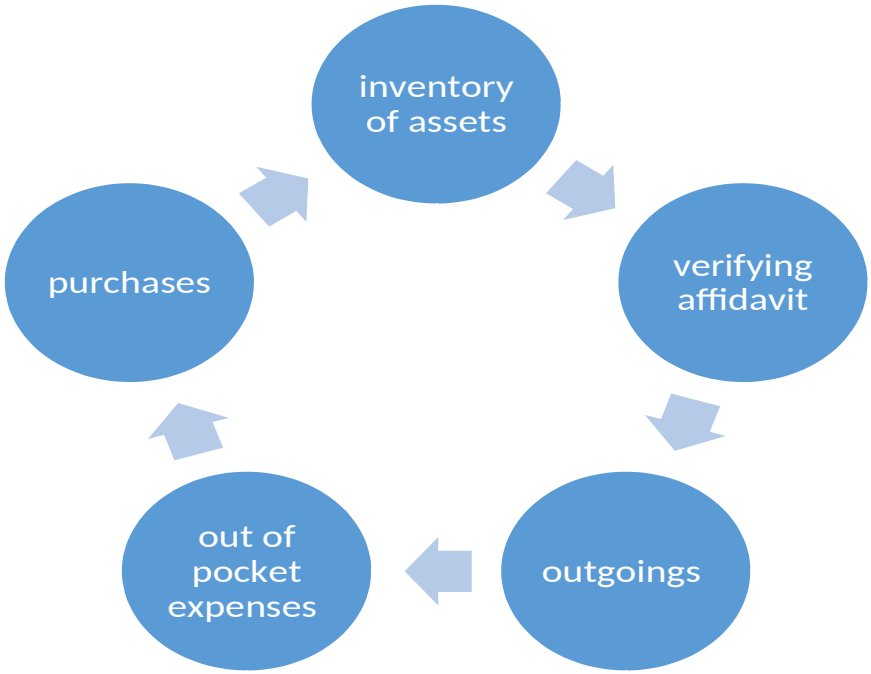
FILING OF ACCOUNT

O. 57 r 16 (1) Lag and O. 49 r 4(1) Abj.

ACCOUNTS INCLUDES:

a. Inventory of all Assets
b. An account of administration:

a. All monies received on behalf of the estate



b. Purchases made
c. Vouchers in the hand of the PR
d. An affidavit of verification

DURATION OF FILING ACCOUNT

- In Lagos, every 12 months from the time when grant was made order 7 rule 16 (1): #200 fine for failure,. . Lagos end of execution,
- In Abuja, when the court calls or direct for filing of the account
- Period given may be extended by the court by the leave of the court.
- Account may be required by the court on action against the PR by beneficiaries
- Account may be required where PR is removed or discharged before completion of the administration of the estate
- Account may be required where the PR is surrendering to the Administrator General
- May be required at the completion of the administration of the estate (at the winding up of the estate)
- In Abuja upon request. For final account.
- Failure to file Account:

i. In Abuja, N100 for every day of default
ii. PR may be directed to remedy his breach by filing the account
iii. Summoned and show cause why he should not be punished

ACCOUNTS WHEN REQUIRED

- Statutory requirement
- Complaint of mal administration
- Removal of personal representative
- Section 32 (1)AEL
- At completion

REVOCATION OF GRANT

Wrongly made

Deceased alive

During life of a caveat

Will discovered: thought of died intestate

Will found

Obtained Fraud

EFFECT OF REVOCATION

No power or capacity to represent the estate

Any action taken prior revocation remain valid.

Every liability incurred would be settled by the estate.

DISCHARGE OF A PR

Functus officio

- A personal representative is attached to the estate for life irrespective winding up of the estate.
- PR don't retire
- If after winding up another property of the deceased is discovered, the PR will take up automatic administration of the part of the estate newly discovered

CESSATION

- Renunciation
- Where PR predeceased the deceased

ASSENT

- Note s. 40 (4) of AEL LAGOS
- Personal representatives would issue assent ot the beneficiaries.
- S. 4 of AEL—content of an Assent:
- It shall be in writing and need not be by deed
- It must be signed some
- Note that assents is required in all states.

CONTENT

1. Must be in writing
2. Must be signed by all the PR; because it is realty it has to be joint.
3. Must name the beneficiaries
4. Must mention the beneficiaries
5. Must operate to vest the legal estate in the property on the beneficiary
6. It shall describe the property.

- Required for the purposes of conferring reality on the beneficiary.
- Must be endorsed on the face of the probate that an Assent has been given.

OBUSEZ V OBUSEZ and NBA V KOKU

DRAFT OF ASSENT

We, Mrs……of No……and Mr……of…….., the personal representatives of Mr……..late of…….., who dies on the 27th of March 2014 in Lagos and whose will was proved by us on the 14th April 2015 at the Probate Registry of the family division of the HC of Lagos State do this 22nd day of March 2016.

As such Personal Representatives:

1. To the vesting in Miss…….. of …….ALL THAT

   SIGNED BY THE ABOVE NAMED

   ….Mr.……

   SIDE CLASS:

   Means of conveying properties

- As beneficial owner
- As a mortgagee
- As a personal Representatives
- As a trustee with the consent of the beneficiaries of the trust

WEEK 19

PROPERTY LAW TAXATION

TAXATION ON PROPERTY PRACTICE

Meaning: compulsory charge by the government on the income of an individual, corporation or trust as well as the value of an estate or gift for public purposes. The Primary purpose is to generate revenue to meet government expenditure. note that It may be levied directly or indirectly.

- **It is direct where persons are taxed to pay for no particular services or goods delivered but simply for the maintenance of government together with its services.**
- **It is indirect where taxes are charged for services rendered, transactions conducted or for other activities.**

DEFINITION OF TERMS

- **LEVY**: they are forms of fines imposed but not necessarily imposed, when somebody is found guilty of misconduct. It may be imposed for management purposes by the government or their agencies.
- **TAX**: they are forms of money majorly statutory in nature and not often imposed independently paid to the government.

FEATURES OF TAX

a. It should be paid in proportion to the citizen's income and wealth.
b. It should be certain not arbitrary
c. It should be levied in the most convenient way
d. Cost of imposing and collecting tax should be minimal
e. Tax should be convenient and competitive internationally

TAX JURISDICTION

- Tax jurisdiction of government are derivative of legislative powers set in the CFRN 1999

FEDERAL GOVERNMENT	STATE GOVERNMENT
Company Income Tax (CIT)	Personal Income Tax
Withholding tax	Withholding Tax
Petroleum Profit Tax (PPT)	Capital Gain Tax
Value Added Tax (VAT)	STAMP Dues
Education Tax (ET)	Road Taxes
Capital Gain Tax (CGT)	Pool betting, lotteries, gaming and Casino T taxes by individuals
Stamp Duties (SD	Business Premises Registration fees
Personal Income Tax (PIT)	Development levies(individual only)
	Registration fees for naming streets in a state in the capital city
	Markets (where state finances are involved)
	Right of Occupancy fees over land owned bySG in urban arrears

NB: Local Governments Authority are also entitled to some taxes

TAXES APPLICABLE TO PROPERTY PRACTICE IN NIGERIA

1. Capital Gain Tax
2. Stamp Duty
3. Personal Income tax
4. Company Income Tax

5. Tenement rates
6. Land use Charge
7. Consent fee

APPLICABLE LAWS

1. Stamp Duties Act
2. Value Added Tax Act
3. Capital Gains Tax Act
4. Personal Income Tax Act (law of various states)
5. Tenement Rate Laws (of various states)
6. Company Income Tax Act
7. Land use Charge Law
8. Land Instrument Registration Law
9. Land Registration Law
10. Rules of Equity
11. Administration of Estate Law
12. Case Law

STAMP DUTIES

- Taxes imposed on and raised from stamps charged on instruments, parchments and other legal instruments. It is a form of endorsement on the instrument upon which the stamp is impressed.
- Usually administered by the commissioner for stamp duties.
- Application for stamping is made with the stamp duties office
- Regulated by the STAMP DUTIES ACT (SDA)
- Some instruments specified for stamp Duties under the SDA includes: Conveyances, leases, mortgage deed and Power of Attorney—s. 2 and 23 SDA
- Some instruments attract fixed or flat rate while other attracts *ad valorem* (Per value of the amount contained in the instrument)
- Unstamped documents are inadmissible in evidence and will not be required for registration.

NB: the code is all documents registrable must be stamped.

- In practice the FG collect SD on instruments executed by corporation and individual resident in the FCT while SG collects SD on instrument executed by individuals in their respective state
- Duties are levied in form of percentage on the value of the property as indicated on the instrument.
- It applies to all property transactions except administration of Estate
- 3 percent is often charged on transactions in many states in Nigeria—s. 10 SDA
- SDT collected by states are treated as part of their Consolidated Revenue Fund while those by the FG will be distributed to all states in proportion of the revenue of Tax derived from the state. See AG OGUN V AGF & ORS (2003)
- At the FG level, it takes SD from Corporate bodies and individual resident at the FCT and at the state level, from transaction between individuals in the state

TIME LIMIT FOR PAYMENT OF SD AND PENALTY

- All instrument that are to be stamped must be done within 40 days of its execution—s. 23 SDA
- Instruments chargeable ad valorem are to be stamped within 30 days. If it is a document requiring Governor's consent, it must be done from the date the Governor consent to the Document.

COMPUTATION OF STAMP DUTIES

- They are generally accessed ad valorem (base of the value of transaction and the consideration).—s. 23, 52 and 55 SDA—in Lagos
- In some instances, stamp duties are charged flat/fixed rate.

EFFECT OF FAILURE TO STAMP

- Unstamped documents attracts liability to the payment of amount of the SD and a fine of 20 naira and where the SD exceed 20 naira, an interest of 10% per annum on the amount of the SD from the date of execution—see OGBAHON V REGISTERED TRUSTEE CCCG

CAPITAL GAIN TAX

- Levied on the **gains** accruing on the **disposal of assets**.
- Regulated by the Capital gain Tax Act (CGTA)
- Capital gain is chargeable on the total amount of chargeable gains accruing to any person in a year of assessment after making the deduction allowed under the CGTA not on the consideration.
- Chargeable gain is the difference between the cost of the assets and the consideration received on its disposal
- The tax is attached to gain, hence where no gain is made, CGT will not be charged
- It applies to gains from sale of land, lease, transfer, assignment, or compulsory acquisition.—s. 6(1) CGTA
- Conveyance does not include transfer of property for the purpose of security (mortgages transaction).—s. 7(4) CGTA (This in essence means CGT is not applicable to Mortgage transactions)
- Devolution of property and vesting of property on beneficiary is not inclusive.
- Rate of CGT is 10% of the chargeable gain

Persons Exempted from CGT

1. Religious, Charitable and Educational Institution of Public Character
2. Statutory or Registered Friendly Societies
3. Cooperative Society Registered under the Cooperative Societies law of a State
4. Trade union registered under the TUA
5. Gains accruing from LGAs
6. Gains accruing to statutory companies and Agencies to purchase and export commodities from Nigeria or to foster economic development of Nigeria.
7. Disposition by way of Gift

ALLOWABLE INCOME—s. 14 CGTA

- Before computation of gains, allowable income are deducted from the total gain benefited from the transaction—s. 13 CGTA. See also ADMINISTRATORS OF THE ESTATE OF CATON V COUCH
- Incomes allowable include:

a. Cost of acquisition by new owner
b. Incidental cost of Acquisition
c. Expenditures incurred for enhancing value and nature of the asset before disposal
d. Expenditure on preservation or defending of title and right
e. Incidental costs towards disposal
f. Fees, commission or remuneration payable to professionals
g. Cost of Advertisement to find a buyer

TAXABLE PERSON

- The person who made the gain.

COMPUTATION

1. Consideration received=
2. Cost of purchase=
3. Gain made—value of allowable income= chargeable gain
4. CGT= 10% of chargeable gain

VALUE ADDED TAX (VAT)

- Governed by the VATA 2004 and VAT (Amendment) Act 2007.
- Paid and charged on supply of all goods and services other than licensed goods and services under VATA—s. 1 and 2 CAMA
- It is a consumption tax, levied at each stage of consumption and borne by the final consumer
- See AG LAGOS V EKO HOTEL
- Also chargeable on individual or company that make profit from trading of real property
- Chargeable at the rate of 5% on the value of the good and services supplied provided by a vatable person or corporations (and a going concern). Necessary for liability of VAT.
- It is administered and managed by the FIRS with the Nigerian Custom Service and the state internal revenue services.
- Distributable proceeds of VAT is 15% to the FG, 50% to SGs and FCT and 35% to LGs
- It is applicable in all property transaction.—a lawyer have the duty to charge VAT from the clients and remit it to the FIRS.

Paid on transaction to transaction basis. Not on yearly basis.

PERSONAL INCOME TAX

- Regulated by the PERSONAL INCOME TAX ACT (PITA)
- A tax imposed on individual, communities, families and executors and trustees for the assessment, collection and administration of tax.
- It is paid on the profit of an income.
- Charged on yearly basis not on transaction to transaction

TAXABLE PERSONS

- Persons to pay PIT includes individuals, communities, families, trustees or executors and partners in a partnership.

a. Individuals: payable in the state where the individual is resident and conduct his domestic affairs
b. Partnerships: payable by the partners to the authority of the principal place of business of the partnership. It is charged on salaries, interest on capitals, leave passage and profit gained in the partnership arrangement.
c. Communities and families: charged by the state authorities in which the communities is resident on the total estimated income of the community or family if it is impracticable to access the members of the family or community individually.
d. Trustees and Executors: charged on the income of their earnings form administration or keeping trust of an estate.

CHARGEABLE INCOME—s. 3(1) PITA

- Charged on yearly assessment from income of taxable persons in sources in and outside Nigeria.

a. Gain or profit made from trade, business, profession or vacation
b. Salaries, wages, fees, allowance or other gains or profit from employment or other prerequisites
c. Gains and profit from premium arising from a right granted for the use and occupation of any property
d. Dividend, interest and discounts
e. Pension, charges or annuity
f. Any profit, gains or other payment

NB: incomes exempted from PIT includes emoluments of diplomats, consular officers, income of foreign Nationals involved in humanitarian works, income of local government and religious, charitable, educational organization, pensions, gratuities etc.—s. 19 and 3rd schedule PITA

RATE OF PIT

- Pay as you earn
- Paid to the FIRS

ALLOWABLE INCOME UNDER PITA—s. 21 PITA

- Expenses wholly, exclusively, necessarily and reasonably by the individual in the production or generation of income—

a. Interest paid on money borrowed and employed in the accruing income
b. Interest on loan for development of residential apartments

c. Rents and premium incurred in respect of land or building for the purpose of acquiring the income
d. Expenses incurred for renewal or alteration of premises, plants, machineries and fixtures employed in acquiring income.

ASSESSMENT OF INCOME

- A person is only liable if at the 1st January in a year of assessment, he has a place or principal place of residence in that state. —s. 2, 5th Schedule PITA
- Percentage payable depends on the assessment of the income of the taxable person for the year
- Chargeable income is the total income for the year minus the allowable income
- All taxable persons are expected to file returns of income derived from the chargeable sources in the preceding year.—s. 41(1) PITA
- Returns are to be filed on oath within 90 days of commencement of the year of assessment and the individual calculate the tax and return payable by him at the failure of which the taxing authority will assess the individual
- See NIGERIAN BREWERIES PLC V LAGOS STATE INTERNAL REVENUE BOARD

NB: for rents payable at the date the rent is paid or credited, the payer of the rent is to deduct 10% of the gross rent and pay it to the relevant authorities, stating:

a. Gross amount of the rent
b. Amount of tax being accounted for
c. Name and address of the recipient and the period for which the rent has been paid or credited
d. The address or accurate description of the location of the property concerned.—see generally s. 69 PITA. See TOTAL (NIG) PLC V AKINPELU

COMPANY INCOME TAX

- Paid by corporations
- Governed by the Company income Tax Act
- Paid to the FIRS

It must be paid every year of existence.

1. CONSENT FEES: prescribe in some state as a prelude for the grant of Governor's consent for alienation of property subject to right of occupancy under s. 22 LUA and also for registering any deed of transfer or mortgage or lease.
- Rate chargeable on consent fees depends on the scale adopted by each state but usually between 3% to 5% of the consideration paid on the property of the transaction
- In Lagos it rate at 8%

2. Registration fee: required to be paid under the LIRL of various state. They are required before registration of documents that are register-able. It may be assessed on the value of the property in respect of which the document is to be registered. Documents on which registration fees are charged include: deeds, lease, subleases, mortgage, gifts, assignment and transfers. In Lagos, documents include:

a. Up-stamping- 1.5% of the value
b. Supplemental deed- 1.5% of the value
c. Deed of Assignment- 3% of the value
d. Sublease- 3% of the value
e. Lease 3%
f. Certificate of purchase 3%
g. Transfer- 3%
h. Gift- 3%
i. Agreement 3%

- In Lagos, application for registration must be made within 60 days from the day on which the governor consent. Paid to the Land Registry to the Registrar of land.
- Registration fees in Lagos is 3%
- General rule, the rate is ad valorem

ESTATE DUTY

- Payable only in respect of Administration of estate
- Paid in application for probate or LOA
- Rate is jurisdictional. In Lagos it is 10%

TENEMENT RATES

- They are charges imposed on house and buildings within a state
- Tenement rate is not charged on land without a building
- There must be presence of a building and occupation of the building before tenement rate will be charged.
- The states provides legislation for the assessment of tenement rates within its area but the local government is the ultimate beneficiary—see para 1 (j) 4th Sch. To CFRN 1999
- Referred to as Land Use Charge in Lagos but still applicable in other states

LAND USE CHARGE IN LAGOS (now applicable in Edo state. The law was enacted last year—2015)

- Regulated by the Land Use Charge Law of Lagos 2003
- It is imposed and payable on all real property in Lagos state
- Paid annually by owners of properties within Lagos
- Only the owner of the taxable property is liable to pay the land use charge
- Rate on value and location of the property
- Charged only on developed properties
- Places exempted includes:

a. Properties used exclusively for public worship or religious education
b. Cemeteries and burial grounds
c. Recognised and registered non-profit making and educational institutions
d. Property used as public library
e. Palaces of recognised chiefs of the state
f. Any property specifically exempted in the official gazette by the Governor.

COMPUTATION OF LAND USE CHARGE

- Responsibility of assessment is on the commissioner for Finance who may appoint an agent for it and may similarly fix annual charge rate for each financial year but required to publish in the state Gazette.
- Annual charge has been set out to be between 0% and 3.5% of the assessed value of the property.
- Formula for computing annual land use charge of any property is:

LUC=M X [(LA X LV) + (BA X BV X PCR)]

LUC= amount of the land use charge payable in naira

M= annual charge rate expressed as a percentage of the assessed value of the property

LA= area of the land parcel in square meter

LV= average value of the land in the neighbourhood, per square meter in naira

BA= total developed floor area of building on the plot of land in square meter

BV= average value of medium quality building in the neighbourhood per square meter in naira

PCR= property code rate for the building

<u>RECOVERY OF LUC</u>

- Action in court by the Commissioner for finance to recover:

a. Sum payable under the law

b. Recover any LUC or penalty incurred by a deceased person
c. Attach a person's earnings an

- LUC demand Notice must be served as a CP within 30 calendar days

Receivership: failure to pay LUA for a period of 135 calendars will make the property liable to the receivership of the state until outstanding taxes, penalties and administrative charges are paid.

TAX CLEARANCE CERTIFICATE (TCC)—s. 85 PITA

- It may be issued on the income of a person for three years immediately preceding the current year of assessment in the following circumstances;

a. Tax is fully paid
b. No tax is due on his income
c. He is not liable to pay tax

- Content of a TCC

a. Chargeable income
b. Tax payable
c. Tax paid
d. Tax outstanding or statement that no tax is due

- Example of dealings where TCC is required

a. Application for government loan for industry or business
b. Application for certificate of Occupancy
c. Application for approval of building plans
d. Application for transfer of real property
e. Application for registration of a LLC or Business Name
f. Application for allocation of market stall
g. Change of ownership of vehicle by the vendor

Application for a plot of land.—see s. 21 PIT (Amendment) Act 2011

TAXES APPLICABLE AND TRANSACTION

SALE OF LAND	LEASES	MORTGAGE E	Administration of Estate	POWER OF ATTORNEY	
VAT			Estate duties	Stamp Duty	
CF			VAT	RF	
SD			PIT(for resealing)		
CIT					
PIT					
CGT		Not applicable			
Land use charge					
Tenement Rate					
RF					

WEEK 20

REVISION CLASS

Failure to Answer Questions Relating to Latent Defect: the solicitor shall advise that the purchaser should withdraw from the transaction on want of title ,…